89-869(1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MYRON HARPER AND JANE HARPER,
Petitioners

v.

FEDERAL LAND BANK OF SPOKANE,
A CORPORATION, *et al.*,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether there is an implied private right of action for Farm Credit System (FCS) borrowers to enforce mandatory procedural requirements of Section 102 of the Agricultural Credit Act of 1987. Those provisions require that FCS lenders:

> a) shall provide written notice to any borrower with a distressed loan indicating that the loan my be suitable for restructuring;
>
> b) shall provide such notice no later than 45 days before beginning any foreclosure with respect to any distressed loan; and
>
> c) shall not begin or continue any foreclosure with respect to any distressed loan until after consideration of any application submitted by the borrower for loan restructuring under the Act.

Section 102, Pub. L. No. 100-233, 12 U.S.C.A. §§ 2201, 2202 (West Supp. 1989).

A direct conflict exists on this question between the court of appeals' decision in this proceeding and a decision of the United States Court of Appeals in *Zajac v. Federal Land Bank of St. Paul,* 887 F.2d 844 (8th Cir. 1989) (App. D).

PARTIES TO THE PROCEEDING

In addition to the respondent named in the caption, other named respondents are the United States of America, acting through the Farmers Home Administration; Willamette Production Credit Association, a corporation in liquidation; Kenneth P. Krueger, in his capacity as President and Chief Executive Officer of the Federal Land Bank of Spokane; Merle Thomas Henny and Darlene F. Henny, husband and wife; Thomas Henny Nursery, Inc., a corporation.

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Petitioners Myron S. and Jane Harper respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-titled proceeding on June 27, 1989.

OPINIONS BELOW

The opinion of the court of appeals of which review is sought (App. A, p. 1a) is reported at 878 F.2d 1172 (9th Cir. 1989). That ruling held that a private right of action is not available to farmer/borrower/shareholders of the Farm Credit System to enforce procedural requirements imposed upon Farm Credit System lenders under § 102 of the Act, P.L. 100-233, 12 U.S.C.A. § 2202a (West Supp. 1989). The court of appeals reversed the order of the district court. The district court order is reported at 692 F. Supp. 1244 (D. Or. 1988). The court of

appeals' August 24, 1989 order denying rehearing and rejecting the suggestion of rehearing *en banc* (App. B, p. 15a-16a) is unreported.

JURISDICTION

The opinion of the court of appeals was entered on June 24, 1989 (App. A, p. 1a). The Harpers' Petition for rehearing and Suggestion for Rehearing *En Banc* was denied August 24, 1989. The court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343. Jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1292(a)(1).

STATUTORY PROVISION INVOLVED

Appendix C sets out relevant portions of the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 12 U.S.C.A. § 2202a (West Supp. 1989).

STATEMENT OF THE CASE

The Agricultural Credit Act of 1987

The Agricultural Credit Act of 1987, Pub. L. No. 100-233, (the Act) constituted a comprehensive and detailed overhaul of the loan-making and loan-servicing requirements of the federally created and chartered Farm Credit System (FCS). The Act also authorized an infusion of up to $4 billion into the troubled System to buoy up its cooperatively owned lending institutions and to prevent further losses to the farmer/shareholders who own those institutions. In all, the Act represents the most complete and intrusive congressional intervention in Agricultural Credit since the Great Depression.

Title I of the Act, "Assistance to Farm Credit System Borrowers," contains numerous mandatory loan-servicing procedures which must be followed by FCS lenders.

The centerpiece of these procedures, codified at 12 U.S.C.A. § 2202a under "Part C-Rights of Borrowers: Loan

Restructuring" concerns restructuring of distressed loans. The entirety of 12 U.S.C.A. § 2202a is set out in Appendix C. Restructuring, in general, is defined in the Act to include virtually any modification of loan terms—including debt write-off—which would make it probable that the farmer's operation will become viable. 12 U.S.C.A. § 2202a. FCS lenders are required to restructure distressed loans if the potential cost to the lender of doing so is less than or equal to the potential cost of foreclosure. 12 U.S.C.A. § 2202a.

To assure that FCS borrowers with distressed loans are given the opportunity to apply and be considered for loan restructuring under these provisions, Congress included in the Act very specific and mandatory procedures for FCS lenders to follow in the case of distressed loans. These procedures include the requirements that FCS lenders

> a) *shall* provide written notice to any borrower with a distressed loan indicating that the loan may be suitable for restructuring.
>
> b) *shall* provide such notice no later than 45 days before beginning any foreclosure with respect to any distressed loan; and
>
> c) *shall not* begin or continue any foreclosure with respect to any distressed loan until after consideration of any application submitted by the borrower for loan restructuring under the Act.

12 U.S.C.A. § 2202a(b) (emphasis added).

The Federal Land Bank (Bank) here declined to afford these procedures to the Harpers, resulting in the litigation below. A review of how those procedures were significant to the Harpers' situation, and why the Bank declined to follow them, completes the statement of the case and lays the groundwork for discussion of the direct conflict between the court of appeals' decision here and the Eighth Circuit's decision in *Zajac*.

The Harpers

Myron and Jane Harper are Oregon farmers. They own and operate a farm which has been in the Harper family since 1853, and which they have farmed since 1949. The Harpers raise hogs, corn and small grains on their farm, which is located in the central Willamette Valley. The have been borrower/shareholders of the Federal Land Bank of Spokane since 1970.

The Harpers' farm was pledged as security to the Bank for two loans in the combined amount of $150,000. The Harpers obtained operating credit from the Willamette Valley Production Credit Association (WPCA) as well as from the Farmers' Home Administration (FmHA), both of which took junior mortgages on the farm real estate as security.

In 1984, the Harpers were unable to make all of their loan payments due to low commodity prices, high interest rates and the general decline of the farm economy. The Bank filed a foreclosure action in state court in January 1987. A judgment was entered in that action September 3, 1987, and a foreclosure sale was scheduled to be held November 17, 1987. The sale was stayed when the Harpers sought to reorganize their debt in a chapter 12 bankruptcy filed November 13, 1987.

The Agricultural Credit Act of 1987 was signed by the President January 6, 1988. The Harpers' Chapter 12 bankruptcy was dismissed in February 1988 and the sheriff's sale was held March 18, 1988. The Bank purchased the Harpers' home place tract; a separate tract of farm ground was purchased by Merle and Darlene Henny, neighbors of the Harpers.

There is no dispute that, at the time the Agricultural Credit Act went into effect January 6, 1988, the Harpers' loans with the Bank were "distressed" within the meaning of § 102. Nor is there any dispute that the Bank declined to provide the Harpers with the notice of loan restructuring required in § 102, and the opportunity to apply and be considered for loan restructuring under that section, at all times relevant to this action.

The Harpers filed this action April 22, 1988 prior to issuance of the sheriff's certificate of sale by the state court. They sought to enjoin final conveyance of the property and eviction from the farm. In the district court action, the Bank admitted it had declined to provide the Harpers with the notice and opportunity to apply for loan restructuring because, it argued, the foreclosure judgment issued by the state court prior to the effective date of the Act extinguished the Harpers' loan as a matter of state law. Thus, it further argued, there was no loan to restructure. The Bank also argued, again under state law, that entry of the foreclosure judgment in state court terminated the state court proceeding. Thus, it concluded, a foreclosure was neither "begun" nor "continued" after the effective date of the Act.

The district court eventually issued a preliminary injunction enjoining transfer of the property or eviction of the Harpers until their claims were resolved.

Applying the traditional factors of *Cort v. Ash,* 422 U.S. 66 (1975), the district court held squarely that there was an implied, private right of action for borrowers to enforce the mandatory procedural requirements of § 102 of the Act, *Harper v. Federal Land Bank of Spokane,* 692 F. Supp. 1244 (D. Or. 1988). The court went on to reject both of the Bank's state law arguments, and held that the Bank had violated the requirements of § 102 by "continuing" the state court foreclosure proceeding against the Harpers without first affording them the required notice of loan restructuring.[1]

The Bank appealed. In an opinion filed June 27, 1989 that addressed only the question of whether the Agricultural Credit Act of 1987 contained an implied, private right of action, the court of appeals, Judge Skopil, held that it did not, and reversed. *Harper v. Federal Land Bank,* 878 F.2d 1172 (9th Cir. 1989)

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1 The court of appeals did not address the state law questions, and they are not at issue here.

(App. A, p. 1a). The Harpers now bring their petition for certiorari to ask this court to review the Ninth Circuit's opinion and judgment, which are in direct conflict with a decision of the United States Court of Appeals for the Eighth Circuit filed October 5, 1989. In that decision, entered in *Zajac v. Federal Land Bank of St. Paul,* 887 F.2d 844 (8th Cir. 1989) (App. D), the court agreed with the *Harper* district court and held that Congress did imply a private right of action in the 1987 Act.

REASONS FOR GRANTING THE PETITION

There now exists a direct conflict between the United States Courts of Appeals for the Eighth and Ninth Circuits on the question of whether there is an implied private right of action for borrower/shareholders to enforce mandatory procedural requirements of § 102 of the Act. In addition, the issue is awaiting a decision of the United States Court of Appeals for the Fourth Circuit in *Payne v. Federal Land Bank of Columbia,* 711 F. Supp. 851 (W.D.N.C. 1989), *appeal pending,* Record No. 89-1028 (4th Circuit).

This issue is also of extraordinary national significance. The Farm Credit System is a federally created agricultural lending system that is cooperatively owned by its 600,000 borrower-shareholders. Farm Credit System lenders, including the respondent Bank, extend approximately 30 percent of all agricultural credit in the nation, with a current total of over $50 billion. Congress underscored the public importance of the Farm Credit System with the comprehensive overhaul of the system contained in the 1987 Act, and its infusion of $4 billion of federal funds into the financially troubled system.

Thus, because there is a direct conflict between two courts of appeals, and the question presented is one of enormous national significance, the petition for certiorari should be granted. Rule 17 of the rules of the Supreme Court of the United States includes, among the considerations governing the court's discretion concerning review on certiorari:

> (a) when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter;
>
> . . .
>
> (c) when a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court . . . .

Here, both considerations are clearly present. In such cases, where there is both a conflict among courts of appeal and an important legal question, this court has exercised its discretion and granted review by writ of certiorari.

The Conflict is Direct

There can be absolutely no doubt that the conflict between the appeals courts' decisions in *Harper* and *Zajac* is absolutely direct within the meaning of Rule 17(a) and this court's prior rulings. In both cases, the fundamental question raised is whether Farm Credit System borrower/shareholders may seek to enforce through injunctive relief in federal court, mandatory procedural requirements of the 1987 Act. In *Harper,* as set out above, the sections of the Act at issue are those mandating a restructuring notice and prohibiting continuation of foreclosures during consideration of restructuring.

In *Zajac,* the farmers had requested an independent appraisal in connection with their application for loan restructuring, a procedure also mandated under the Act. 12 U.S.C.A. § 2202(d). The St. Paul Bank refused to allow such an appraisal, and the Zajacs filed an action in the district court seeking to enjoin sale of their farm property pursuant to a foreclosure judgment entered in the state court. The district court dismissed the Zajacs' complaint, holding *inter alia,* that there was not an implied, private right of action to enforce the mandatory procedures of the Act. The Eighth Circuit reversed.

It is important, in comparing the Eighth and Ninth Circuit decisions, to note that the issue raised is extremely narrow, and virtually identical, in both cases. That issue, stated most narrowly, is whether the mandatory, procedural requirements of § 102 of the 1987 Act may be enforced in the district court through declaratory and injunctive relief. This is the only relief sought by the Harpers and the Zajacs, and the only relief issued or considered by the district courts and courts of appeals. Neither case involved damages; *Harper* did not discuss relief broader than enforcement of mandatory procedural requirements of the Act and, in *Zajac,* the Eighth Circuit painstakingly circumscribed its holding to include only enforcement of such mandatory requirements.

The starkness of the conflict between *Harper* and *Zajac* is emphasized by a point by point comparison of the appeals courts' analyses and conclusions under this court's well-established inquiry for determining the presence of an implied private right of action. *Cort v. Ash,* 422 U.S. 66 (1975); *Thompson v. Thompson,* 484 U.S. 174 (1988). On each of the four *Cort* factors, and on the overarching congressional intent requirement of *Thompson,* the courts reach diametrically opposed conclusions.

The Especial Benefit Question

Harper

On the first *Cort* factor, whether the plaintiff was one for whose "especial benefit" the statute was enacted, the *Harper* court of appeals "conclude(d) that the major impetus for the legislation was the financial crisis of the Farm Credit System." *Harper,* 878 F.2d at 1174-75 (App. A, p. 6a). Thus, the court further concluded, the legislation was passed to benefit the system, not its borrowers. In reaching this conclusion, the court did not address the fact that the system is owned cooperatively by its shareholders.

Zajac

In *Zajac,* the Eighth Circuit commented directly on the *Harper* court's conclusions concerning the "especial benefit" test:

> *We disagree.* There can be no doubt that farmer-borrowers are a protected class under the Act because its language and structure established broad rights for borrowers and mandatory duties for lenders. A private cause of action will be readily found 'where the language of the statute explicitly confer(s) a right directly on a class of persons that include(s) the plaintiff. *Universities Research Ass'n v. Coutu,* 450 U.S. 754, 771 (1981), quoting *Cannon v. University of Chicago,* 441 U.S. 677, 690, n.13 (1979); *Miener v. Missouri,* 673 F.2d 969, 974, n.4 (8th Cir. 1982).

Zajac, 887 F.2d at 856, n.15 (App. D, p. 51a) (emphasis added). The court also found squarely that "(T)he 1987 Act was enacted, first and foremost, 'to provide credit assistance to farmers.' H.R. Conf. Rep., 100th Cong. 1st Sess., 1." *Id.* at 14.

Intent of Congress

The paramount consideration under *Cort* and *Thompson* is, of course, the intent of Congress:

> [U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or same source, the essential predicate for implication of a remedy simply does not exist."

Thompson v. Thompson, 484 U.S. 174, 108 S. Ct. 513, 520 (1988). Again, the Eighth and Ninth Circuits reached conclusions 180 degrees apart.

Harper

In *Harper,* the appeals court reasoned that, because case law under predecessor statutes to the 1987 Act had determined that those statutes did not include an implied private right of action, Congress' failure to include in the 1987 Act an *express* private right of action signaled its intent to leave intact what the appeals court concluded was the status quo. *Harper,* 878 F.2d at 1175 (App. A, p. 8a).

In its discussion of legislative intent, however, the *Harper* court completely ignored several essential factors including: (a) the substantial and mandatory "borrower protections" Congress included in the 1987 Act, including those at issue here; (b) the fact that not one statement by any congressional member or witness can be found in the legislative history which opposes a private right of action for FCS borrowers; (c) the fact that all statements and activity chronicled in the legislative history evidence only a positive congressional attitude toward the right of FCS borrowers to privately enforce the mandatory procedural requirements of the Act; and (d) the fact that virtually all of the earlier FCS cases noted by the court had sought damages, not the limited declaratory and injunctive relief sought by both the Zajacs and the Harpers.

Ignoring these factors, the court simply stated that the introduction during the legislative process of express private right of action language which was ultimately not included in the final text of the Act could only mean that Congress intended that there be no right of action at all. The court dismissed, as "inadvertent" or even "planned" efforts to sabotage the bill, the plethora of congressional statements in the history which indicated that various members of Congress believed either that (a) borrowers already had the right to sue to enforce the Act and Congress should not restrict it or, (b) borrowers had the right to sue so no provision was necessary or, (c) a provision was needed to codify the right to sue that borrowers already enjoyed. The court failed to recognize that every one of these statements from the legislative history—although perhaps

inaccurate or inconsistent with one another—represented a positive statement on the question of a private right of action for FCS borrowers.

Finally, the *Harper* court held that Congress had created administrative remedies that it intended to be the sole vehicle for enforcement of the mandatory procedural requirements of the Act. These, the court held, consisted of the Credit Committee review process required in 12 U.S.C.A. § 2202(a) and (c) and the "extensive" enforcement powers of the Farm Credit Administration set out in 12 U.S.C.A. §§ 2261-2274.[2] And, while it acknowledged that the Harpers had identified numerous glaring inadequacies in these administrative procedures, the court held nonetheless that:

> We do not dispute that an implied private right of action would enhance the administrative remedies provided under the Act. We have previously rejected, however, enhancement as a factor in the analysis of implied remedies.

Harper, 878 F.2d at 1176-77 (App. A, p. 10a).

Zajac

Again, the *Zajac* court, looking to the same language, structure and history of the 1987 Act, came to the opposite conclusion. From an exhaustive review and analysis of the text of the Act, the House, Senate and Conference Reports, and the reported floor discussion from the Senate, the *Zajac* court concluded:

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2 The court declined to note, however, that both of these procedures were created in the Food Security Act of 1985, not in the Agricultural Act of 1987, and that nowhere in the lengthy and detailed legislative history of the 1987 Act was either of these procedures cited or discussed as an alternative to judicial enforcement.

> In the light of the above, there certainly can be no quarrel that Congress viewed the Act as responsive to the needs of farmer-borrowers in ways that earlier Farm Credit Acts were not. Moreover, the Act clearly manifests Congress' intent to provide borrowers with the ability to enforce procedures granted to protect them from unjustified foreclosures. *This can only be done by implying a private right of action for borrowers.*

Zajac v. Federal Land Bank of St. Paul, 887 F.2d at 851 (App. D, p. 39a) (emphasis added).

In reaching this conclusion, the Zajac court did several things the *Harper* court did not. First, unlike the *Harper* court, the *Zajac* court looked closely to both the structure and language of the relevant provisions of the 1987 Act, the essential requirement set out by this court in *Thompson.* Structurally, the court noted that Title I of the 1987 Act, entitled "Assistance to Farm Credit System Borrowers" in Public Law 100-233, was codified as "Rights of Borrowers; Loan Restructuring." *Zajac,* 887 F.2d at 848 (App. D, p. 31a).

The language of the Act, the court noted, was also clearly mandatory and exceedingly detailed, unlike its predecessor Acts. Thus, the Act requires that

- independent appraisers *shall* be appointed;
- written notice *shall* be provided;
- foreclosures *may not* be continued or begun;
- FCS lenders *shall* meet with borrowers;
- loans *shall* be restructured if it is less costly than foreclosure.

Zajac, 887 F.2d at 848 (App. D, p. 31a-32a). From this, the court found that both the structure and language evidenced congressional intent to confer enforceable rights.

Second, the *Zajac* court noted that the prior decisions of the Eighth Circuit cited by the *Harper* court as cases under "predecessor statutes" were just that—decisions under the predecessor 1985 statute *and, moreover,* that they were cases in which the plaintiffs had sought damages under that Act, not the narrow declaratory and injunctive relief sought by the Zajacs (and the Harpers) under the 1987 Act.[3]

Third, the *Zajac* court undertook an exhaustive and enormously detailed analysis of exactly what happened in the various congressional committee, conference and floor proceedings, and just what it was the members were seeking to achieve with the Act. With respect to the discussion of, but failure to include, an express private right of action in the Act, the court concluded that the authors of the bill believed that inclusion of the express House amendment would limit, not create or expand, borrowers' rights to bring an action to enforce the Act. The *Zajac* court also noted that these were not inadvertent or isolated comments in the record—rather, the court said:

> [T]hey were the comments by those in Congress responsible for managing the Act through the legislative process, making their statements more indicative of legislative intent than typical statements made during congressional proceedings.

Zajac, 887 F.2d at 853 (App. D, p. 42a). Indeed, as further pointed out in Note 7 of the *Zajac* opinion, there is not one single comment or document cited from the legislative history indicating congressional intent not to allow borrowers a vehicle of private enforcement of the Act. *Zajac,* 887 F.2d at 852, n. 7 (App. D, p. 42a).

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3 *Redd v. Federal Land Bank of St. Paul,* 851 F.2d 219 (8th Cir. 1988); *Mendel v. Federal Land Bank of St. Paul,* 862 F.2d 180 (8th Cir. 1988).

Finally, while the appeals court here ignored the significance of the inadequacies cited by the Harpers in the supposed FCS administrative remedies, and apparently ignored this court's holding in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) as well, the *Zajac* court looked closely at those procedures and concluded "In sum, borrowers are unable to enforce their rights through administrative avenues." *Zajac*, 887 F.2d at 855 (App. D, p. 48a). This court's language in Cannon, ignored entirely by the appeals court below in this case, compelled the Eighth Circuit's opinion:

> [Congress] has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute.

441 U.S. 677 (1979).

Clearly, the Ninth Circuit here, and the Eighth Circuit in *Zajac*, could not have reached decisions more at odds on the second, and most important *Cort* element—Congressional intent.

Consistency with Legislative Purpose

Harper

The court of appeals here concluded that Congress' principal objective in passing the 1987 Act was to restore financial integrity to the Farm Credit System. *Harper*, 878 F.2d at 1177 (App. A, p. 11a). While it agreed with the district court that a private right of action would strengthen the Farm Credit System "because it forces the lenders to make cost-effective decisions concerning the possibility of restructuring loans," the court ultimately contradicts itself and states that '(A)llowing a private right of action undermines that objective by involving the Farm Credit System in costly litigation.'" *Harper*, 878 F.2d 1172 at 1177 (App. A, p. 11a).

Zajac

Again, the conflict with the *Zajac* decision is absolute. There, the Eighth Circuit held that:

> Implying a private right of action for borrowers to enforce carefully defined procedures mandated by the language of the Act is also consistent with a further goal of the 1987 Act to strengthen and stabilize the Farm Credit System. . . . Injunctive relief strengthens, rather than weakens, the Farm Credit System by requiring lenders to make a decision based on a thorough review of all factors and procedures deemed important by Congress.

Zajac, 887 F.2d at 851, 852 (App. D, p. 39a-40a).

Cause of Action Relegated to State Law

The disagreement between the Eighth and Ninth Circuits becomes complete under the Fourth *Cort* element—whether the cause of action is one traditionally relegated to state law.

Harper

The Ninth Circuit essentially undertook a tautological approach to this question and declared, without any analysis of the history, purpose or legislative underpinnings of the Farm Credit System, that "mortgage foreclosures are traditionally a matter of state law," *Harper*, 878 F.2d at 1177 (App. A, p. 11a), citing *Rank v. Nimmo*, 677 F.2d 692, 697 (9th Cir.), *cert. denied*, 459 U.S. 907 (1982).

Zajac

In *Zajac*, the court concluded otherwise, acknowledging the altogether and unique federal nature of the Farm Credit System:

> First, the Federal Land Banks were created by Congress in 1916 as 'instrumentalities of the United States.' 12 U.S.C.A. § 2011. Indeed, the entire Farm Credit System itself is uniquely federal because it is

> created by and exists at the pleasure of the Congress. Also, systemwide requirements of the Agricultural Credit Act of 1987, such as restructuring, are not only uniquely federal; such provisions are absolutely federal.

Zajac, 887 F.2d at 856 (App. D, p. 49a).

Thus, the conflict is complete; element by element, point by point, the United States Courts of Appeals for the Eighth and Ninth Circuits have reached utterly unreconcilable, contradictory conclusions on the most critical question yet presented to any federal court under the Agricultural Credit Act of 1987. And it is because that question is so critical, in addition to the conflict, that this court should grant certiorari.

The Question Is of Enormous Significance and Should Be Settled By this Court

The petitioners recognize that a conflict between the two courts of appeals may not be of sufficient concern alone to warrant review by this court. However, when that conflict involves an important issue of federal statutory construction, and application of a federal law across the entire country, the case for review by writ of certiorari is strengthened.[4] There can be no question that that importance exists here.

The Agricultural Credit Act was passed at a time of grave financial difficulty for the Farm Credit System as a whole, and a time of grave individual financial crisis for tens of thousands of its borrowers. It was also a time during which, in the words of the House report on H.R. 3030:

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4 *McElroy v. United States*, 455 U.S. 642 (1982); *Marks v. United States*, 430 U.S. 188 (1977); *Fuller v. Oregon*, 417 U.S. 40 (1974); *York v. Soper*, 336 U.S. 328 (1949); *Brotherhood v. United States*, 330 U.S. 395 (1947); *Shapiro v. United States*, 335 U.S. 1 (1948).

> Complaints about the rights of system borrowers being abused at both the association and district levels have been like a constant drumbeat in the offices of some members of Congress for several years.

H.R. Rep. No. 295(I), 100th Cong., 1st Sess. 52, *reprinted* in 1988 U.S. Code Cong. and Admin. News 2723, 2733. Indeed, it was a time when the Chairman of the House Sub-Committee that wrote H.R. 3030, Representative Jones of Tennessee, reported the bill to the floor of the House with the statement:

> In summary, I want to let the system and FCA know that together they destroyed the integrity of the 1985 Farm Credit Act and necessitated this year's legislation. The Congress cannot tolerate such irresponsible action again and we expect the system and its regulator to diligently undertake their respective responsibilities and to cooperate in those matters that are necessary to ensure that full advantage is taken of the provisions of the new law.

133 Cong. Rec. H11869, H11873 (Dec. 18, 1987).

To emphasize that its seriousness reflected that of Chairman Jones, the Congress ultimately passed in the Act a law literally riddled with mandatory procedural and substantive requirements, both in Title I concerning borrower protections and in Titles of the Act which substantially restructured the Farm Credit itself and provided for federal financial assistance to be made available to troubled system institutions. For example, in addition to the borrower protection provisions already discussed, Congress required in clear, mandatory language, with no discretionary exceptions:

- Protection of borrower stock. 12 U.S.C.A. § 2162.
- Disclosure of loan terms. 12 U.S.C.A. § 2199.
- Access to documents. 12 U.S.C.A. § 2200.

- Release of shareholder lists and corporate charters. 12 U.S.C.A. § 2184.
- Protection from foreclosure or demands for additional collateral for borrowers whose loans were paid current. 12 U.S.C.A. § 2202d.
- The right of first refusal for previous owner/borrowers to lease or purchase property acquired from them by system lenders. 12 U.S.C.A. § 2219a.
- Shareholder votes on institutions' discretionary mergers. 12 U.S.C.A. § 2279C-1.
- Affirmative action plans. 12 U.S.C.A. § 2219c.
- Prohibition on signed ballots. 12 U.S.C.A. § 2208.
- Minimum capitalization requirement for system lenders. 12 U.S.C.A. § 2154.
- Purchase of system insurance. 12 U.S.C.A. § 2277a-5.
- Mandatory requests for financial assistance by certain troubled lenders. 12 U.S.C.A. § 2278a-4.
- Assumption of system-wide loss sharing obligations. 12 U.S.C.A. § 2155(a).

In short, Congress was very serious in 1987 and passed legislation unprecedented since the very creation of the modern Farm Credit System during the Great Depression.

The system's demographics were noted above: 600,000 borrower/shareholders; 30 percent of all U.S. agricultural debt; outstanding debt totalling $50 billion; a total of 11 Farm Credit Banks (plus one Federal Land Bank in liquidation) and scores of Production Credit Associations and Federal Land Bank Associations serving FCS borrower/shareholders' needs nationwide.

Finally, it is significant that the issue raised in Harper and Zajac has been raised in no fewer than 12 cases in the lower courts, three of which have reached their respective appeals courts, and two of which have now been decided.[5] This court has held that an issue under a federal statute takes on great significance for the question of review by certiorari when the issue poses the threat of hindrance to effective implementation of the law, *Rothensies v. Electric Battery Co.,* 329 U.S. 296 (1946); where the issue is of great importance to the agricultural community, *National Broiler Mktg Ass'n v. United States,* 436 U.S. 816 (1978); where the question is an important one of first impression under the statute, *American Fed'n of Musicians v. Wittstein,* 379 U.S. 171 (1964); and, where the issue is troublesome because it has been raised and is pending in numerous lower courts, *Laing v. United States,* 423 U.S. 161 (1976); *United States v. Standard Oil Co.,* 332 U.S. 301 (1947); *United States v. Parnell,* 330 U.S. 238 (1947). Finally, the court has acknowledged the importance for review when a case affects large numbers of persons, *Patterson v. Lamb,* 329 U.S. 539 (1947), particularly when there is also a conflict among circuits on the issue. *FTC v. Jantzen, Inc.,* 386 U.S. 228, 229 (1967). This case satisfies each and every one of the considerations set out by the court in these cases.

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5 *Griffin v. Federal Land Bank of Wichita,* 708 F. Supp. 313 (D. Kan. 1989); *Leckband v. Naylor,* No. 3-88-167 (D. Minn. May 17, 1988), *appeal dismissed,* No. 88-5301 (8th Cir. June 8, 1989); *Martinson v. Federal Land Bank of St. Paul,* No. A2-88-31 (D.N.D. Apr. 21, 1988), *appeal dismissed,* No. 88-5202 (8th Cir. June 8, 1989); *In re Hilton Land and Cattle,* 101 Bankr. 604 (D. Neb. 1989); *Meredith v. Federal Land Bank,* 690 F. Supp. 786 (E.D. Ark. 1988); *Federal Land Bank of St. Louis v. McGinnis,* 711 F. Supp. 952, 958 (E.D. Ark. 1989); *Harper v. Federal Land Bank of Spokane,* 878 F.2d 1172 (9th Cir. 1989) (App. A); *Wilson v. Federal Land Bank of Wichita,* No. 88-4058-R (D. Kan. Jan. 30, 1989); *Neth v. Federal Land Bank of Jackson,* No. 88-0324-B-C (S.D. Ala. Dec. 30, 1988); *Payne v. Federal Land Bank of Columbia,* 711 F.2d Supp. 851 (W.D.N.C. 1989), *appeal pending,* Record No. 89-1028 (4th Cir.); *Jarrett Ranches v. Farm Credit Bank of Omaha,* Case No. 88-10117, Adversary No. 89-1001 (Bankr. Ct. S.D. Aug. 16, 1989).

CONCLUSION

The conflict between the Eighth and Ninth Circuit Courts of Appeals in *Harper* and *Zajac* could not be more stark, or more definitive. The question presented is of paramount importance, to the Farm Credit System as a whole, to its lenders and borrower/shareholders, and, because of the 1987 infusion of federal funds into the system, to every taxpayer as well. The Petition for Certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 88-4033, 88-4120.

MYRON S. HARPER and JANE HARPER,
Plaintiffs-Appellees,

v.

FEDERAL LAND BANK OF SPOKANE,
a corporation, *et al.,*
Defendants-Appellants.

OPINION

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted May 4, 1989.
Decided June 27, 1989.

Before TANG, SKOPIL and KOZINSKI,
Circuit Judges

Owen M. Panner, Chief Judge, Presiding

Richard A. Edwards, James N. Westwood, Miller, Nash, Wiener, Nash, Wiener, Hager & Carlsen, Portland, Or., John D. Albert, Churchill, Leonard, Brown & Donaldson, Salem, Or., for defendants-appellants.

James T. Massey, Farmers' Legal Action Group, Inc., Sisters, Or., Michael J. Martinis, Webb and Martinis, Salem, Or., for plaintiffs-appellees.

Jocelyn F. Olson, Asst. Atty. Gen., State of Minn., St. Paul, Minn., for amici curiae.

Richard W. Brunette, Jr., Marsha D. Galinsky, Sheppard, Mullin, Richter & Hampton of Los Angeles, Cal., for amicus curiae Western Farm Credit Bank.

OPINION

SKOPIL, Circuit Judge:

The primary issue on appeal is whether there is an implied private right of action to enforce the Agricultural Credit Act of 1987 ("1987 Act"), 12 U.S.C. §§ 2001-2279aa-14. The district court held that the 1987 Act creates such an action and found that the Federal Land Bank ("FLB") and Willamette Production Credit Association ("WPCA") violated the statute. *Harper v. Federal Land Bank of Spokane,* 692 F. Supp. 1244, 1252-53 (D.Or.1988). We hold there is no implied private right of action for the 1987 Act. We reverse.

FACTS AND PRIOR PROCEEDINGS

Myron and Jane Harper ("the Harpers") own and operate a farm in Oregon encumbered by mortgages held by FLB and WPCA. The Harpers began having difficulty with loan repayments in the early 1980's. In May 1984 WPCA rejected the Harpers' loan renewal request and filed a foreclosure action against them five months later in state court. In February 1985 the Harpers filed a complaint against numerous institutions and officers of the Farm Credit System seeking, *inter alia,* an order enjoining WPCA's state foreclosure proceeding. The district court denied the Harpers' motion for an injunction and dismissed the action. *Harper v. Farm Credit Admin.,* 628 F. Supp. 1030, 1033-34 (D.Or.1985).

After several continuances of the state court's foreclosure trial, the Harpers entered into a settlement agreement to restructure the WPCA debt. Instead of performing the settlement, however, the Harpers filed a Chapter 11 bankruptcy petition on May 30, 1986. In July 1986 WPCA obtained relief from the automatic stay, and the state foreclosure action was reinstated.

In September 1986 FLB obtained relief from the automatic stay and filed a foreclosure complaint against the Harpers in January 1987. In June 1987 the Harpers asked FLB about

possible forbearance on their FLB loans. FLB supplied them an application form and requested financial information but received neither an application for forbearance nor financial data from the Harpers until April 21, 1988.

On September 3, 1987 the state court entered a default judgment of foreclosure in favor of FLB. On October 9, 1987 WPCA secured a judgment of foreclosure by stipulation. FLB scheduled a sheriff's sale for November 17, 1987. On November 13, 1987 the Harpers filed a Chapter 12 bankruptcy petition, thereby staying the sheriff's sale. In February 1988, on the Harpers' motion, the bankruptcy court dismissed the petition. The sheriff's sale was held in March 1988.

The Harpers thereafter moved to set aside the judgments. The state court found that the judgments were authorized by the Harpers' prior attorney, denied the Harpers' motion to set aside the judgments, and ruled that the order confirming the sale could be entered.

The Harpers then filed this action in federal district court seeking an injunction barring continuation of the state court process. The district court granted a preliminary injunction and enjoined FLB and WPCA (together "the Lenders") from transferring the property pending resolution of the Harpers' claims. After a court trial the district court held that the Lenders violated the 1987 Act. *Harper,* 692 F. Supp. at 1253. The court concluded that the Lenders had a duty under federal law to "weigh the costs of foreclosure against the costs of restructuring prior to proceeding with the sheriff's sale." *Id.* The Lenders were enjoined from evicting the Harpers from their property. *Id.* The district court also issued an order directing the parties to apply to state court for an order rescinding the sheriff's sale.

On appeal, the Lenders contend the 1987 Act does not provide an implied private right of action. Alternatively, they argue (1) they have not violated the 1987 Act; (2) the actions taken by the district court were prohibited by the Anti-Injunction Act, 28 U.S.C. § 2283 (1982); (3) the district court did not have the authority to command the parties to

stipulate in state court to an order rescinding a completed sheriff's foreclosure sale or to restrain the purchasers from taking possession of the property; and (4) the district court's findings as to WPCA are clearly erroneous. We decide only that there exists no private right of action and therefore we do not reach the alternative arguments.

DISCUSSION

I.

In *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2087-88, 45 L.Ed.2d 26 (1975), the Supreme Court set forth four factors to determine whether Congress intended to imply a private cause of action in a federal statute.

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted--that is, does the statute create a federal right in favor of plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78, 95 S. Ct. at 2088 (internal quotations and citations omitted) (emphasis in original). Subsequent to *Cort*, the Court has indicated that the second and third factors are determinative of whether a court should imply a private right of action from a statutory scheme. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 105 S. Ct. 3085, 3091-92, 87 L.Ed.2d 96 (1985); *see also In re Washington Public Power Supply Sys. Sec. Litig.*, 823 F.2d 1349, 1354 (9th Cir.1987) (en banc) ("a failure to satisfy these two factors is determinative").

Moreover, it is now clear that the focal point of our inquiry is the second factor--the intent of Congress. *See Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 516, 98 L.Ed.2d 512 (1988) (unless congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, a private remedy simply does not exist). Nevertheless, we look to all four factors "[a]s guides to discerning that intent." *Id.*

1. Especial Benefit of Plaintiffs

The district court concluded that the Harpers satisfied the first factor as "one of the class for whose especial benefit the statute was enacted" because Title I of the 1987 Act, entitled "Assistance to Farm Credit System Borrowers," established broad rights for borrowers and mandatory duties for lenders. *Harper*, 692 F. Supp. at 1247. We agree that one of the purposes of the 1987 Act was to provide borrowers with certain limited rights, including the right to restructure distressed loans and the right of first refusal by the previous owner when the lenders elect to sell acquired property. We look at the overall purpose of the 1987 Act, however, and conclude that the major impetus for the legislation was the financial crisis of the Farm Credit System. "[The bill] is necessary to reassure both American farmers and our financial markets that the Farm Credit System will remain a viable entity next year and into the 21st century." 133 Cong.Rec.S. 16831 (Dec. 1, 1987) (remarks of Sen. Leahy). "[The bill] has two major objectives: First, provide meaningful assistance to the system; and second, minimize to the greatest extent possible exposure to the Federal budget." 133 Cong.Rec.S. 16833 (Dec. 1, 1987) (remarks of Sen. Boren).

Our conclusion that the financial crisis of the Farm Credit System was the primary purpose of the 1987 Act is further reinforced by the fact that a borrower's right to restructure a delinquent loan is limited to situations in which the cost of restructuring is less than or equal to the cost of foreclosure. 12 U.S.C. § 2202a(e)(1). In other words, restructuring is not

always available to borrowers but is limited to situations involving no additional expense to the system.

2. Legislative Intent

The district court concluded that the legislative history supports an implied right of action, even though Congress considered enacting an express private right of action and later deleted that section. *Harper,* 692 F. Supp. at 1247-49. The court reasoned that the express provision was eliminated because some members of Congress "were under the misperception that the farmers already had the right to sue." *Id.* at 1248. Senators Pryor, Cochran, Fowler, and Sanford, for example, sought to include an express private right of action "to affirm that borrowers have a right to sue." S. 1156, 100th Cong. 1st Sess. 133 Cong.Rec. 6105 & 6107 (May 6, 1987). One version of the Senate bill included an express private right of action. S. 1665, 100th Cong., 1st Sess., 133 Cong.Rec. 11750 (August 7, 1987).

A proposed House bill also contained an express private right of action. Representative Watkins said he believed that "the right to sue is implied within the bill itself" but an express provision was necessary "to make sure that there is no question that the borrower has that right." H.R. 3030, 100th Cong., 1st Sess., 133 Cong.Rec. 7638, 7692 (September 21, 1987). In response to a question whether farmers currently had the right to sue, Representative Watkins responded that in some states they did, and Representative De La Garza said "I think basically they have that right now." *Id.* at 7693.

Prior to a conference committee on the bills, Senator Burdick questioned whether the House bill's inclusion of a private right of action "actually restricts the right to sue." S. 1665, 100th Cong. 1st Sess., 133 Cong.Rec. 16993, 16995 (December 2, 1987). Senator Boren responded with a plan to "oppose that House provision in the conference committee." *Id.* The Senate opposed the House provision and it was deleted from the final 1987 Act. H.R. 3030, 100th Cong., 1st Sess., 133 Cong.Rec. 11820 (December 18, 1987).

The district court concluded from that legislative history that "[b]oth the House and Senate intended that the borrower have the right to bring a private action in federal court to enforce the Act." *Harper,* 692 F. Supp. at 1248, citing *Cannon v. University of Chicago,* 441 U.S. 677, 711, 99 S. Ct. 1946, 1965, 60 L.Ed.2d 560 (1979) ("the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was.") (internal quotations omitted). It is abundantly clear, however, that there existed no implied private right of action under the various predecessor statutes or regulations in force prior to the 1987 Act. *See, e.g., Bowling v. Block,* 785 F.2d 556, 557 (6th Cir.) (Farm Credit Act of 1971), *cert. denied,* 479 U.S. 829, 107 S. Ct. 112, 93 L.Ed.2d 60 (1986); *Smith v. Russellville Prod. Credit Ass'n,* 777 F.2d 1544, 1548 (11th Cir.1985) (Farm Credit Act of 1971 and regulations); *Redd v. Federal Land Bank of St. Louis,* 661 F. Supp. 861, 864 (E.D.Mo.1987) (1985 amendments), *aff'd,* 851 F.2d 219, 223 (8th Cir.1988); *Mendel v. Production Credit Ass'n,* 656 F. Supp. 1212, 1216 (D.S.D.1987) (1985 amendments), *aff'd,* 862 F.2d 180, 182 (8th Cir.1988). *But cf. Federal Land Bank of St. Paul v. Overboe,* 404 N.W.2d 445, 449 (N.D.1987) (allowing use of 1985 amendments as an affirmative defense in state foreclosure action).

"The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection,* 474 U.S. 494, 501, 106 S. Ct. 755, 759-60, 88 L.Ed.2d 859 (1986). Here, an express private right of action was proposed in both houses of Congress but deleted in the final conference version. "'Because the conference report represents the final statement of the terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent.'" *Department of Health and Welfare v. Block,* 784 F.2d 895, 901 (9th Cir.1986) (quoting *Demby v. Schweiker,* 671 F.2d 507, 510 (D.C.Cir.1981)). We conclude that the district court gave inappropriate weight to remarks made by members of Congress.

See Regan v. Wald, 468 U.S. 222, 237, 104 S. Ct. 3026, 3035, 82 L.Ed.2d 171 (1984). "To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Id.*

Even if the congressional statements are ambiguous on the creation of a private right of action, our review of the administrative remedies provided by the 1987 Act convinces us that Congress intended administrative review to be the exclusive remedy. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1, 15, 101 S. Ct. 2615, 2623-24, 69 L.Ed.2d 435 (1981) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."); *see also Karahalios v. National Fed'n of Fed. Employees,* Local 1263, --- U.S. ----, 109 S. Ct. 1282, 1287, 103 L.Ed.2d 539 (1989) (administrative remedies provided by statute shows clear congressional intent not to provide a private cause of action).

Here the administrative scheme provides for "Credit Review Committees" which must include farmer-director representatives. 12 U.S.C. § 2202(a). The applicant/borrower is entitled to prompt written notice of any action taken with respect to the denial or reduction of a loan or the denial of loan restructuring. 12 U.S.C. § 2201(a). If a loan application or loan restructuring proposal is denied, the applicant/borrower is entitled to learn the reason for the denial and to receive notice of the applicant's/borrower's right to seek review of the adverse decision. 12 U.S.C. § 2201(b). The applicant/borrower has the right to seek review of the adverse decision and to bring counsel or other representation to seek a reversal of the denial. 12 U.S.C. §§ 2202(b) & (c). In addition, 12 U.S.C. § 2261-2274 grants extensive enforcement powers to the Farm Credit Administration ("FCA"). The FCA has the power to issue cease and desist orders against any institutions or persons who violate

the statute or applicable regulations, as well as the power to suspend or remove Farm Credit System officers and directors. 12 U.S.C. §§ 2266(b), 2264. The FCA is further empowered to assess civil and criminal sanctions to enforce these provisions. 12 U.S.C. §§ 2268(a), 2269.

The Harpers nevertheless contend that the remedies available are not comprehensive enough to preclude an implied private cause of action under the 1987 Act. First, they claim there is no procedure for filing charges or for compelling FCA to commence an investigation. Second, they argue that FCA's enforcement apparatus is inadequate to enforce the borrower's rights. Third, they assert that FCA's authority to issue temporary cease and desist orders is limited to violations likely to cause insolvency and that FCA's issuance of permanent cease and desist orders is extremely time consuming. Finally, they argue there is no provision in the statute guaranteeing any remedy for the individual borrower; thus borrowers will be without a remedy for lender violations.

We do not dispute that an implied private right of action would enhance the administrative remedies provided under the 1987 Act. We have previously rejected, however, enhancement as a factor in the analysis of implied remedies. *Le Vick v. Skaggs Companies, Inc.*, 701 F.2d 777, 778-79 (9th Cir.1983). Moreover, the argument that a private right of action must be implied or else borrowers will be without a remedy overlooks the apparent right in some states of a borrower to allege the failure to afford restructuring rights as an affirmative defense to foreclosure. *See Federal Land Bank of St. Paul v. Bosch*, 432 N.W.2d 855, 858-59 (N.D.1988) (allowing use of 1986 regulations as an affirmative defense in state foreclosure action); *Overboe*, 404 N.W.2d at 449 (allowing use of 1985 Act as an affirmative defense in state foreclosure action). *But see Federal Land Bank of St. Louis v. Hopmann*, 658 F. Supp. 92, 94 (E.D.Ark.1987) (rejecting defense).

3. Consistency with Legislative Purpose

The district court concluded that a private right of action strengthens the Farm Credit System because it forces lenders to make cost effective decisions concerning the possibility of restructuring loans. *Harper,* 692 F. Supp. at 1249. While we do not disagree with that conclusion, we do conclude that the primary purpose of the 1987 Act was to restore financial integrity to the Farm Credit System. Allowing a private right of action undermines that objective by involving the Farm Credit System in costly litigation. Although the statute provides borrowers with limited rights, the major purpose of the 1987 Act was to provide financial stability to the Farm Credit System at a minimum cost to taxpayers. 133 Cong.Rec.S. 16833 (Dec. 1, 1987) (remarks of Sen. Boren).

4. Cause of Action Relegated to State Law

The district court concluded that the rights created under the 1987 Act were exclusively federal because Congress's goal of keeping farmers on their land is not a traditional state concern. *Harper,* 692 F. Supp. at 1249. The district court, however, addressed only sections 2202a(c) and (d) regarding loan restructuring and ignored section 2202a(b)(3) which prohibits lenders from continuing foreclosure proceedings. We have held that the latter is traditionally controlled by state law. *See Rank v. Nimmo,* 677 F.2d 692, 697 (9th Cir.) (no private right of action under the Veterans Administration Home Loan Guarantee Program to set aside a foreclosure since mortgage foreclosures are traditionally a matter of state law), *cert. denied,* 459 U.S. 907, 103 S. Ct. 210, 74 L.Ed.2d 168 (1982).

5. Summary

We conclude that none of the four *Cort* factors supports an implied private cause of action under the 1987 Act. Because Congress provided administrative remedies to borrowers and we find the legislative history to be ambiguous, "we are compelled to conclude that Congress provided precisely the

remedies it considered appropriate." *Middlesex,* 453 U.S. at 15, 101 S. Ct. at 2623. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club,* 451 U.S. 287, 297, 101 S. Ct. 1775, 1781, 68 L.Ed.2d 101 (1981). Thus we join the several other courts which have also rejected an implied right of action under the 1987 Act. *See, e.g., Wilson v. Federal Land Bank of Wichita,* No. 88-4058-R (D.Kan. Jan. 30, 1989) (1989 WL 12731); *Neth v. Federal Land Bank of Jackson,* 717 F. Supp. 1478 (S.D.Ala. 1988); *Zajac v. Federal Land Bank of St. Paul,* No. 88-A3-88-115 (D.N.D. July 19, 1988) 1988 WL 166 118, *appeal pending,* No. 88-5353 (8th Cir.). *But see Griffin v. Federal Land Bank of Wichita,* 708 F. Supp. 313 (D.Kan.1989) (allowing a private right of action but finding no violation); *Leckband v. Naylor,* 715 F. Supp. 1451 (D.Minn. May 17, 1988) (allowing a private right of action to enforce right of first refusal), appeal pending, No. 88-5301 (8th Cir.); *Martinson v. Federal Land Bank of St. Paul,* No. A2-88-31 (D.N.D. Apr. 21, 1988) (same), *appeal pending,* No. 88-5202 (8th Cir.).

II.

The district court sua sponte declared that the Harpers also presented a 42 U.S.C. § 1983 claim. *Harper,* 692 F. Supp. at 1251-52. We agree that an independent section 1983 inquiry is required because "there could well be federal rights enforceable under section 1983 which are not enforceable by means of a private right of action under the statute creating them." *Boatowners and Tenants Ass'n, Inc. v. Port of Seattle,* 716 F.2d 669, 674 (9th Cir.1983). We conclude, however, that section 1983 does not provide a cause of action to remedy the violations alleged by the Harpers. Courts have refused to apply section 1983 to plaintiffs alleging violations of the Farm Credit Act of 1971 and the 1985 amendments. *See Schroder v. Volcker,* 646 F. Supp. 132, 135 (D.Colo.1986) (plaintiff did not allege that defendants were state actors or that state foreclosure laws permitted sale of plaintiffs' property without notice and opportunity to contest the sale; therefore "plaintiffs have failed

to allege that the defendants acted under color of state law"), *aff'd*, 864 F.2d 97, 98-99 (10th Cir.1988); *Brekke v. Volcker*, 652 F. Supp. 651, 654-55 (D.Mont.1987) (same). Furthermore, the fact that a state permits the use of foreclosure procedures and subsequent sheriff sales as the execution of a judgment is not sufficient to constitute state action. *Earnest v. Lowentritt*, 690 F.2d 1198, 1202 (5th Cir.1982); *see also Roudybush v. Zabel*, 813 F.2d 173, 177 (8th Cir.1987) ("State policy is not implicated when an injured party claims that a private party has violated a constitutional post-judgment procedural statute in the course of depriving the injured party of property."); *Kolb v. Naylor*, 658 F. Supp. 520, 524 (N.D.Iowa 1987) ("use of state law to foreclose is not sufficient to allege a claim under section 1983"). Thus we hold that the Harpers have not alleged and may not maintain a section 1983 action.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 88-4033/4120

MYRON S. HARPER and JANE HARPER,
Plaintiffs-Appellees,

v.

FEDERAL LAND BANK OF SPOKANE,
a corporation, *et al.,*
Defendants-Appellants.

ORDER

On Appeal from the United States District Court
for the District of Oregon

Filed August 24, 1989

Before TANG, SKOPIL and KOZINSKI,
Circuit Judges

Owen M. Panner, Chief Judge, Presiding

The panel has voted to deny the petition for rehearing. Judges Tang and Kozinski have voted to reject the suggestion for rehearing en banc, and Judge Skopil recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

Section 102 of the Agricultural Credit Act of 1987, 12 U.S.C. § 2202a

SEC. 102. Restructuring distressed loans

(a) Definitions

As used in this part (other than in 2205 and 2206 of this section):

(1) Application for restructuring

The term "application for restructuring" means a written request—

(A) from a borrower for the restructuring of a distressed loan in accordance with a preliminary restructuring plan proposed by the borrower as a part of the application;

(B) submitted on the appropriate forms prescribed by the qualified lender; and

(C) accompanied by sufficient financial information and repayment projections, where appropriate, as required by the qualified lender to support a sound credit decision.

(2) Cost of foreclosure

The term "cost of foreclosure" includes—

(A) the difference between the outstanding balance due on a loan made by a qualified lender and the liquidation value of the loan, taking into consideration the borrower's repayment capacity and the liquidation value of the collateral used to secure the loan;

(B) the estimated cost of maintaining a loan as a nonperforming asset;

(C) the estimated cost of administrative and legal actions necessary to foreclose a loan and dispose of property acquired as a result of the foreclosure, including attorneys' fees and court costs;

(D) the estimated cost of changes in the value of collateral used to secure a loan during the period beginning on the date of the initiation of an action to foreclose or liquidate the loan and ending on the date of the disposition of the collateral; and

(E) all other costs incurred as the result of the foreclosure or liquidation of a loan.

(3) Distressed loan

The term "distressed loan" means a loan that the borrower does not have the financial capacity to pay according to its terms and that exhibits one or more of the following characteristics:

(A) The borrower is demonstrating adverse financial and repayment trends.

(B) The loan is delinquent or past due under the terms of the loan contract.

(C) One or both of the factors listed in subparagraphs (A) and (B), together with inadequate collateralization, present a high probability of loss to the lender.

(4) Foreclosure proceeding

The term "foreclosure proceeding" means—

(A) a foreclosure or similar legal proceeding to enforce a lien on property, whether real or personal, that secures a nonaccrual or distressed loan; or

(B) the seizing off and realizing on nonreal property collateral, other than collateral subject to a statutory lien arising under subchapters I or II of this chapter, to effect collection of a nonaccrual or distressed loan.

(5) Loan

The term "loan" means a loan made to a farmer, rancher, or producer or harvester of aquatic products, for any

agricultural or aquatic purpose and other credit needs of the borrower, including financing for basic processing and marketing directly related to the borrower's operations and those of other eligible farmers, ranchers, and producers or harvesters of aquatic products.

(6) Qualified lender

The term "qualified lender" means—

(A) a System institution that makes loans (as defined in paragraph (5)) except a bank for cooperatives; and

(B) each bank, institution, corporation, company, union, and association described in section 2074(a)(2) of this title but only with respect to loans discounted or pledged under section 2074(a) of this title.

(7) Restructure and restructuring

The terms "restructure" and "restructuring" include rescheduling, reamortization, renewal, deferral of principal or interest, monetary concessions, and the taking of any other action to modify the terms of, or forbear on, a loan in any way that will make it probable that the operations of the borrower will become financially viable.

(b) Notice

(1) In general

On a determination by a qualified lender that a loan made by the lender is or has become a distressed loan, the lender shall provide written notice to the borrower that the loan may be suitable for restructuring, and include with such notice—

(A) a copy of the policy of the lender established under subsection (g) of this section that governs the treatment of distressed loans; and

(B) all materials necessary to enable the borrower to submit an application for restructuring on the loan.

(2) Notice before foreclosure

Not later than 45 days before any qualified lender begins foreclosure proceedings with respect to a loan outstanding to any borrower, the lender shall notify the borrower that the loan may be suitable for restructuring and that the lender will review any such suitable loan for restructuring, and shall include with such notice a copy of the policy and the materials described in paragraph (1).

(3) Limitation on foreclosure

No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section.

(c) Meetings

On determination by a qualified lender that a loan made by the lender is or has become a distressed loan, the lender shall provide a reasonable opportunity for the borrower thereof to personally meet with a representative of the lender—

(1) to review the status of the loan, the financial condition of the borrower, and the suitability of the loan for restructuring; and

(2) with respect to a loan that is in nonaccrual status, to develop a plan for restructuring the loan if the loan is suitable for restructuring.

(d) Consideration of applications

(1) In general

When a qualified lender receives an application for restructuring from a borrower, the qualified lender shall determine whether or not to restructure the loan, taking into consideration—

(A) whether the cost to the lender of restructuring the loan is equal to or less than the cost of foreclosure;

(B) whether the borrower is applying all income over and above necessary and reasonable living and operating expenses to the payment of primary obligations;

(C) whether the borrower has the financial capacity and the management skills to protect the collateral from diversion, dissipation, or deterioration;

(D) whether the borrower is capable of working out existing financial difficulties, reestablishing a viable operation, and repaying the loan on a rescheduled basis; and

(E) in the case of a distressed loan that is not delinquent, whether restructuring consistent with sound lending practices may be taken to reasonably ensure that the loan will not become a loan that it is necessary to place in nonaccrual status.

(2) Applications not required for restructuring plans

This section shall not prevent a qualified lender from proposing a restructuring plan for an individual borrower in the absence of an application for restructuring from the borrower.

(e) Restructuring

(1) In general

If a qualified lender determines that the potential cost to a qualified lender of restructuring the loan in accordance with a proposed restructuring plan is less than or equal to the potential cost of foreclosure, the qualified lender shall restructure the loan in accordance with the plan.

(2) Computation of cost of restructuring

In determining whether the potential cost to the qualified lender of restructuring a distressed loan is less than or equal to the potential cost of foreclosure, a qualified lender shall consider all relevant factors, including—

(A) the present value of interest income and principal forgone by the lender in carrying out the restructuring plan;

(B) reasonable and necessary administrative expenses involved in working with the borrower to finalize and implement the restructuring plan;

(C) whether the borrower has presented a preliminary restructuring plan and cash-flow analysis taking into account income from all sources to be applied to the debt and all assets to be pledged, showing a reasonable probability that orderly debt retirement will occur as a result of the proposed restructuring; and

(D) whether the borrower has furnished or is willing to furnish complete and current financial statements in a form acceptable to the institution.

(f) Least cost alternative

If two or more restructuring alternatives are available to a qualified lender under this section with respect to a distressed loan, the lender shall restructure the loan in conformity with the alternative that results in the least cost to the lender.

(g) Restructuring policy

(1) Establishment

Each farm credit district board of directors shall develop a policy within 60 days after January 6, 1988, that is consistent with this section, to govern the restructuring of distressed loans. Such policy shall constitute the restructuring policy of each qualified lender within the district.

(2) Contents of policy

The policy established under paragraph (1) shall include an explanation of—

(A) the procedure for submitting an application for restructuring; and

(B) the right of borrowers with distressed loans to seek review by a credit review committee in accordance with section 2202 of this title of a denial of an application for restructuring.

(3) Submission of policy to FCA

Each district board shall submit the policy of the district governing the treatment of distressed loans under this section to the Farm Credit Administration. Notwithstanding the duty imposed by the preceding sentence, the other duties imposed by this section shall take effect on January 6, 1988.

(h) Reports

During the 5-year period beginning on January 6, 1988, each qualified lender shall submit semiannual reports to the Farm Credit Administration containing—

(1) the results of the review of distressed loans of the lender; and

(2) the financial effect of loan restructurings and liquidations on the lender.

(i) Compliance

The Farm Credit Administration may issue a directive requiring compliance with any provision of this section to any qualified lender that fails to comply with such provision.

(j) Permitted foreclosure

This section shall not be construed to prevent any qualified lender from enforcing any contractual provision that allows the lender to foreclose a loan or from taking such other lawful action as the lender deems appropriate, if the lender has reasonable grounds to believe that the loan collateral will be destroyed, dissipated, consumed, concealed, or permanently removed from the State in which the collateral is located.

(k) Application of section

The time limitation prescribed in subsection (b)(2) of this section, and the requirements of subsection (c) of this section, shall not apply to a loan that became a distressed loan before January 6, 1988, if the borrower and lender of the loan are in the process of negotiating loan restructuring with respect to the loan.

(l) Assistance in restructuring

Each Federal intermediate credit bank, on request of any production credit association, may assist the association in restructuring loans under this section.

(Pub. L. 92-181, Title IV, § 4.14A, as added Pub. L. 100-233, Title I, § 102(a), Jan. 6, 1988, 101 Stat. 1574.) 12 U.S.C. § 2202a.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-5353.

Raymond P. Zajac and Helen Ann Zajac,
Appellants,
v.
Federal Land Bank of St. Paul,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

Submitted Dec. 12, 1988.
Decided Oct. 5, 1989.

Before HEANEY* and FAGG, Circuit Judges, and HANSON,** Senior District Judge.

HEANEY, Senior Circuit Judge.

* The HONORABLE GERALD W. HEANEY assumed senior status on December 31, 1988.

** The HONORABLE WILLIAM C. HANSON, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

Raymond and Helen Zajac, a North Dakota farm couple, appeal from a decision of the district court holding that the Agricultural Credit Act of 1987 (Act) does not provide the Zajacs with a private right of action to enjoin the Federal Land Bank of St. Paul (Bank) from foreclosing on the Zajacs' property until the Bank honors their request that an independent appraiser be appointed to appraise their property for purposes of restructuring their distressed loan with the Bank.

We hold that the Zajacs have a private right of action under the Act to require the appointment of an independent appraiser and remand to the district court for action consistent with this opinion.

BACKGROUND

In 1980, the Zajacs borrowed $250,000 from the Bank. By 1986, they were unable to continue making payments, and the Bank commenced foreclosure proceedings in state court. The Zajacs raised a number of defenses to the action. On December 14, 1987, the state court issued a decision in favor of the Bank.

The Bank delayed entry of its state court foreclosure judgment to afford the Zajacs an opportunity to restructure their loan under sections 102 and 106 of the Agricultural Credit Act of 1987, 12 U.S.C. §§ 2202 and 2202a.

The Zajacs submitted an application for restructuring, which was considered but denied by the Bank on April 15, 1988, on the ground that the Bank would incur a greater loss under the Zajacs' restructuring proposal than would occur through a sale of the property at foreclosure. The Zajacs appealed that decision to the Bank's credit review committee. They asked the committee to appoint an independent appraiser pursuant to procedures required by the Act. The committee refused and, after a hearing, denied the Zajacs' application for restructuring. Judgment of foreclosure was entered by the state court on May 6, 1988.

The Zajacs appealed the judgment of foreclosure to the Minnesota Supreme Court and moved for a stay of judgment. The motion was denied, and the trial court was affirmed.

At that point, the Zajacs asked the United States District Court to enjoin the Bank from conducting a sheriff's sale on their land until it had complied with certain borrowers' rights provisions of the Act, including the provision mandating an independent appraisal.[1] The district court denied the Zajacs' motion after hearing. It held that there is no expressed or implied private right of action for failure to comply with the borrowers' rights provisions of the Act, that the Act did not require an independent appraisal of the Zajacs' land,[2] that the

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1 The Zajacs asserted in district court that they had been denied the right to an independent appraisal by the credit review committee, that Ken Bergh, CEO of the Bank, hated the Zajacs, that Bergh was on the credit review committee in violation of the Act, that if the committee would adopt the Zajacs' figures and methodology a different result could be reached on the analysis of cost of foreclosure as opposed to cost of restructuring, and that irreparable injury would result if the sheriff's sale was not enjoined. The only issue raised on appeal, however, is whether the trial court erred in holding that the Zajacs did not have a private cause of action to enforce their right to an independent appraisal prior to review by the credit review committee.

2 The lower court concluded from the statutory language that credit review committees have no legal obligation to appoint an independent appraiser in restructuring situations. The Zajacs argue that the lower court's interpretation is incorrect because it ignores the Agricultural Technical Corrections Act of 1988, which clearly states that borrowers have a right to an independent appraisal on review of a denial of restructuring. The Bank argues that the Technical Corrections Act should not apply retroactively in this case. We disagree with the Bank and hold that the district court erred. Section 1001 of the Technical Corrections Act provides that the amendments made by the Act "shall take effect as if enacted immediately after the enactment of the 1987 Act." Pub.L. No. 100-399, § 1001, 102 Stat. 989, 1008 (1988). Since the Agricultural Credit Act of 1987 became operative on January 6, 1988, the Technical Corrections Act became operative well before the Zajacs requested the independent appraisal in April of 1988. Moreover, there is no manifest injustice to the Bank from such retroactive application because the Bank presumably knew the state of the law in May of 1988 when it denied the Zajacs' request for an independent appraisal. Thus, the cases cited by the Bank in its brief are inapposite.

Bank's decision to deny restructuring was a commercial banking decision and that the relief requested would violate the Federal Anti-Injunction Act, 28 U.S.C. § 2283.

DISCUSSION

I. IS THE BORROWER'S PROCEDURAL RIGHT TO HAVE AN INDEPENDENT APPRAISER APPOINTED ENFORCEABLE IN FEDERAL COURTS?

The Agriculture Credit Act of 1987 does not provide an explicit private right of action to a borrower. Thus, the question is whether a borrower has an implied cause of action to enforce the independent appraisal procedures required by the Act.

The Act provides detailed procedures and formulae under which a borrower can seek to have a distressed loan restructured.[3] The bank is to restructure loans unless the cost of restructuring exceeds the cost of foreclosure.[4] Restructuring is defined as follows:

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3 12 U.S.C. § 2202a(a)(3) provides as follows:

The term "distressed loan" means a loan that the borrower does not have the financial capacity to pay according to its terms and that exhibits one or more of the following characteristics:

(A) The borrower is demonstrating adverse financial and repayment trends.

(B) The loan is delinquent or past due under the terms of the loan contract.

(C) One or both of the factors listed in subparagraphs (A) and (B), together with inadequate collateralization, present a high probability of loss to the lender.

4 12 U.S.C. § 2202a(a)(2) and (e) provide as follows:

(a)(2) **Cost of foreclosure**

The term "cost of foreclosure" includes—

(A) the difference between the outstanding balance due on a loan made by aqualified lender and the liquidation value of the loan, taking into consideration the borrower's repayment capacity and the liquidation value of the collateral used to secure the loan;

(B) the estimated cost of maintaining a loan as a nonperforming asset;

(C) the estimated cost of administrative and legal actions necessary to foreclose a loan and dispose of property acquired as

> The terms "restructure" and "restructuring" include rescheduling, reamortization, renewal, deferral of principal or interest, monetary concessions, and the taking of any other action to modify the terms of, or forbear on, a loan in any way that will make it probable that the operations of the borrower will become financially viable.

12 U.S.C. § 2202a(a)(7). If the lender rejects the request for restructuring, further procedures can be instituted by the

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> the result of the foreclosure, including attorneys' fees and court costs;
>
> (D) the estimated cost of changes in the value of collateral used to secure a loan during the period beginning on the date of the initiation of an action to foreclose or liquidate the loan and ending on the date of the disposition of the collateral; and
>
> (E) all other costs incurred as the result of the foreclosure or liquidation of a loan.
>
> * * *
>
> (e)(1) **Restructuring in general**
>
> If a qualified lender determines that the potential cost to such qualified lender of restructuring the loan in accordance with a proposed restructuring plan is less than or equal to the potential cost of foreclosure, the qualified lender shall restructure the loan in accordance with the plan.
>
> (2) **Computation of cost restructuring**
>
> In determining whether the potential cost to the qualified lender of restructuring a distressed loan is less than or equal to the potential cost of foreclosure, a qualified lender shall consider all relevant factors, including—
>
> (A) the present value of interest income and principal forgone by the lender in carrying out the restructuring plan;
>
> (B) reasonable and necessary administrative expenses involved in working with the borrower to finalize and implement the restructuring plan;
>
> (C) whether the borrower has presented a preliminary restructuring plan and cash-flow analysis taking into account income from all sources to be applied to the debt and all assets to be pledged, showing a reasonable probability that orderly debt retirement will occur as a result of the proposed restructuring; and
>
> (D) whether the borrower has furnished or is willing to furnish complete and current financial statements in a form acceptable to the institution.

borrower. The borrower can request a review of that decision. 12 U.S.C. § 2202(b)(1). As an aspect of that review, the Act grants a borrower the right to an independent appraisal. 12 U.S.C. § 2202(d).

In determining whether the Zajacs have an implied cause of action to assert a borrower's procedural right to an independent appraisal and other mandated procedures under the Act, the question of congressional intent is the ultimate issue and "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 520, 98 L.Ed.2d 512 (1988). We hold, however, that the necessary intent is found in the language and structure of the 1987 Act, as well as its legislative history and general purpose.[5]

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5 Several courts have held that the 1987 Act creates an implied private right of action. *Griffin v. Federal Land Bank of Wichita*, 708 F. Supp. 313 (D.Kan.1989) (implicitly allowing a private right of action but finding no violation); *Leckband v. Naylor*, 715 F. Supp. 1451 (D.Minn.1988) (allowing a private right of action to enforce right of first refusal), *appeal dismissed*, No. 88-5301 (8th Cir. June 8, 1989); *Martinson v. Federal Land Bank of St. Paul*, No. A2-88-31 (D.N.D. Apr. 21, 1988) (same), *appeal dismissed*, No. 88-5202 (8th Cir. June 8, 1989); *In re Hilton Land & Cattle*, 101 B.R. 604 (D.Neb.1989) (allowing a private right of action in a bankruptcy action); *Meredith v. Federal Land Bank*, 690 F. Supp. 786 (E.D.Ark.1988) (implicitly allowing private right of action but dismissing for failure to state a claim). *See also Federal Land Bank of St. Louis v. McGinnis*, 711 F. Supp. 952, 958 (E.D.Ark.1989) (granting borrowers an affirmative defense on the basis that creditor failed to comply with the Act but denying relief because parties in question were not borrowers under the Act). *But see Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir.1989); *Wilson v. Federal Land Bank of Wichita*, No. 88-4058-R, 1989 WL 12731 (D.Kan. Jan. 30, 1989); *Neth v. Federal Land Bank of Jackson*, 717 F. Supp. 1478 (S.D.Ala.1988).

A. Language and Structure

The 1987 Act emphasizes that borrowers have the power to initiate certain procedures. Part C of the Act is entitled *"Rights of Borrowers; Loan Restructuring."* One of the procedures that borrowers can initiate is the right to an independent appraisal at the credit review committee stage of a restructuring proceeding. The pertinent part of the Act reads as follows:

> An appeal filed with a credit review committee under this section may include, as a part of the request for a review of the decision filed under subsection (b)(1) or (2) of this section, a request for an independent appraisal, by an accredited appraiser, of any interests in property securing the loan (other than the stock or participation certificates of the qualified lender held by the borrower).
>
> * * *
>
> Within 30 days after a request for an appraisal under paragraph (1), the credit review committee shall present the borrower with a list of three appraisers approved by the appropriate qualified lender from which the borrower shall select an appraiser to conduct the appraisal the cost of which shall be borne by the borrower and *shall consider the results of such appraisal in any final determination with respect to the loan.*
>
> * * *
>
> A copy of any appraisal made under this subsection shall be provided to the borrower.

12 U.S.C. § 2202(d)(1), (2) and (3) (emphasis added).

The language requiring the appointment of an independent appraiser upon request is mandatory rather than permissive. The System lender is directed to follow the statutory

procedure—the only discretion left to the lender and the credit review committee is to present the borrower with a list of three appraisers from which the borrower can select. Having done this, the committee is mandated to consider the results of the appraisal in any final determination with respect to the loan.

The language used by Congress with respect to the other borrowers' rights provisions is also mandatory in setting forth exceedingly detailed procedures that System lenders must follow. Thus, the Act provides, *inter alia:*

(a) That when it is determined that a loan made by a lender is distressed, the lender *shall* provide written notice to the borrower that the loan may be suitable for restructuring. 12 U.S.C. § 2201(b).

(b) That not later than 45 days before a lender begins foreclosure proceedings, the lender *shall* notify the borrower that the loan may be suitable for restructuring. 12 U.S.C. § 2202a(b)(2).

(c) That *no lender may* foreclose a distressed loan before the lender has completed consideration of the loan for restructuring. 12 U.S.C. § 2202a(b)(3).

(d) That the lender *shall* provide a reasonable opportunity for the borrower to meet personally with a representative of the lender. 12 U.S.C. § 2202a(c).

(e) That if the lender determines that the potential cost of restructuring a loan in accordance with a post-restructuring plan is less than or equal to the potential cost of foreclosing, the qualified lender *shall* restructure the loan in accordance with the plan. 12 U.S.C. § 2202a(e)(1).

The detail and precision by which Congress set forth borrowers' rights under this section are powerful indications that Congress intended to confer specific enforceable rights on borrowers. A private cause of action will be readily found "'where the language of the statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff.'"

Universities Research Ass'n v. Coutu, 450 U.S. 754, 771-72, 101 S. Ct. 1451, 1462, 67 L.Ed.2d 662 (1981), quoting *Cannon v. University of Chicago*, 441 U.S. 677, 690 n. 13, 99 S. Ct. 1946, 1954 n. 13, 60 L.Ed.2d 560 (1979); *Miener v. State of Mo.*, 673 F.2d 969, 974 n. 4 (8th Cir.1982). The corollary of this is that if a System lender grants the specific rights mandated by the Act, there is no further purpose served by a judicial review of the lender's ultimate decision regarding foreclosure or restructuring. *Coutu*, 450 U.S. at 772, 101 S. Ct. at 1462.

The reasons why Congress found it necessary to adopt such detail and precision are set forth more fully in subsequent sections of this opinion. Suffice to say that earlier efforts of Congress to encourage restructuring of distressed loans had been ignored by many System lenders and Congress intended to remedy this situation.

B. The House Report

The House Report sets forth the twofold purpose of the Act. It stated:

> H.R. 3030 *will require* Farm Credit System lenders to restructure the loans of financially-stressed farmer-borrowers, in order to help keep farmers on the land and help turn around the condition of stressed System institutions.

H.R.Rep. No. 295(I), 100th Cong., 1st Sess. 52 (emphasis added), *reprinted in* 1987 U.S.CODE CONG. & ADMIN. NEWS 2723, 2723.

It went on to say:

> Much of the impetus for H.R. 3030 derives from the continuing depression in agriculture that began in the early 1980's but whose roots originate in the inflationary period in the late 1960's and 1970's.
>
> * * *

> H.R. 3030 * * * looks to the future—to an agricultural delivery system that not only will have dealt sensitively with today's financially-stressed farm borrowers but one that will be more competitive, more efficient and more responsive to economic realities.

Id. at 53-54, *reprinted in* 1987 U.S.CODE CONG. & ADMIN. NEWS at 2725.

The Report further states that the highlights of H.R. 3030 include:

> *Providing enhanced borrowers' rights and require restructuring rather than foreclosure of certain loans.*

Id. (emphasis added).

In discussing the testimony of the various witnesses to appear before the House committee, the Report states:

> Dozens of witnesses representing farmer and commodity groups testified before the Committee as to two basic weaknesses in the way many System institutions have dealt with its problems. First, System lenders have been exceedingly reluctant to restructure individual loans on a case-by-case basis; and, second, the tensions and pressures on both borrowers and lenders, brought on by financial distress, have caused collapse of the traditional sense of comity and good will between the System and its borrower/owners.

Id. at 62, *reprinted in* 1987 U.S.CODE CONG. & ADMIN. NEWS at 2733.

The Report went on to state:

> Complaints about the rights of System borrowers being abused at both the association and district levels have been like a constant drumbeat in the

> offices of some Members of Congress for several years. The package of borrower rights adopted in H.R. 3030 reflect a common sense approach which should have been standard operating procedures in a cooperative, borrower-owned lending system.

Id. at 64, *reprinted in* 1987 U.S.CODE CONG. & ADMIN. NEWS at 2735.

C. The Senate Report

In forwarding the Act to the floor of the Senate, the Senate Committee on Agriculture, Nutrition and Forestry stated that the Act called "for a major reorganization of the credit delivery mechanism for American agriculture" to assure economic security for the family farmer and rancher and stability of the Farm Credit System. S.Rep. 230, 100th Cong., 1st Sess., 21 (1987). One of the major elements of this reorganization was the mandated restructuring of distressed loans. This was necessary because System lenders were not restructuring when restructuring was cost-effective. The Act

> requires that System banks and associations receiving assistance must, in turn, assist troubled farmers and ranchers by restructuring their delinquent loans where that restructuring is less costly than foreclosure. Each Farm Credit System (FCS) District, that contains a System institution certified to receive assistance must establish a Special Asset Group to review each loan of a distressed farmer or rancher that is slated for foreclosure.
>
> These restructuring procedures were modeled after the St. Paul FCS District's restructuring program—farmers had their loans restructured when that was beneficial both to the System and the farmer. This program has helped thousands of needy farmers *and* has generated income for the

> System. Applying these procedures nationally will help alleviate a major drain on the System * * *.

Id. at 3. The Senate Report notes that the Senate bill granted farmer-borrowers specific rights to ensure an accurate determination of whether restructuring was cost-effective.

> Title IV provides farmer-borrowers with important rights—including the right to loan information (regarding differential interest rates, loan origination charges, changes in interest rates and loan options) and the right of first refusal to repurchase or lease land formerly owned by a borrower that has been foreclosed on by a System institution. Providing borrowers with advance and accurate loan information will allow them to make better informed financial decisions.
>
> Also, banks and associations *will be required* to use Credit Review Committees to review denials of new loans and restructuring of distressed loans. In order to both assist the institution, by creating earning assets, and to help the family farmer in all System institutions, the distressed loans of family farmers *must be restructured* under Title IV if the cost of restructuring is less than the cost of foreclosure.

Id. at 4-5 (emphasis added).

By granting farmer-borrowers certain specific rights, the Senate also intended to remedy many of the drastic consequences—including the tremendous number of foreclosures forcing farm families out of their homes—caused by the agricultural depression of the 1980's.

> The agricultural depression of the 1980's rivals that of the 1930's in terms of its impacts on farmers.
>
> * * *

> Farmers who either began operating in the 1970's or significantly expanded their operations in this period are most affected by the decline in land values because they have the greatest amount of debt. However, even farmers with no debt, who are close to retirement, have seen their net worth and hence their retirement savings stripped away by the collapse of farmland values.
>
> While debt has fallen significantly in the last three years the burden has not been uniformly reduced. Many of those reducing their debt holdings were able to do so because they had relatively low levels of debt relative to their income. Most disturbing to the Committee, the other major group causing the fall in debt has been those farmers forced off their farms as a result of their inability to meet their commitments to lenders. While roughly 40 percent of farmers have no debt some 10-12 percent of farmers holding 37 percent of the total debt are in extreme financial difficulty.

Id. at 14.

Senator Boren (D.-Okla.), the Senate manager of the bill, stated upon introduction of the bill to the Senate floor that:

> All institutions *must* restructure an eligible borrower's nonaccruing loan if: First, it is cheaper to restructure than to foreclose; second, the borrower is applying all income over and above necessary and reasonable living and operating expenses; third, if the borrower has the financial capacity and management skills to protect the collateral; fourth, if the borrower is capable of working out existing financial difficulties.
>
> * * *

> Borrowers who request an appeal to the credit review committee may also request that an independent appraisal of the collateral securing the loan be conducted. If an independent appraisal is requested, the *committee must consider the results of the independent appraisal when making its final determination on the loan.*

133 Cong.Rec. S16831 (1987) (emphasis added).

D. The Conference Report

The Conference Report reiterated the broad goal of the Act previously expressed in the House and Senate Reports. The 1987 Act was enacted, first and foremost, "to provide credit assistance to farmers." H.R.Conf.Rep., No. 490, 100th Cong., 1st Sess., 1. Chairman of the Conference Committee, Representative de la Garza, of Texas, in reading the Conference Report to the House, clearly expressed what the Conference Committee thought to be the driving force for enactment of the Act: "the terrible problem that our farmers and ranchers in rural America have experienced during the past several years." 133 Cong.Rec. H11869 (1987). He went on to say:

> Mr. Speaker, I hope that my colleagues will join with us to send the message at this point that we care, *that we would like for them to have another tool at their disposal,* which is credit of an acceptable nature so that they could continue providing us with the excellent food and fiber that they have done in the past.

Id. (emphasis added).

Senator McClure (R.-Idaho), upon the return of the Conference Report to the Senate and just before final passage of the Act, expressed the sentiment of Congress in terms that few could misunderstand:

> The most important part of this legislation ... is the restructuring of farm loans of financially stressed farmer-borrowers of the System. In order to keep these farmers on the land it is necessary for System banks and associations to change their attitude toward debt restructuring. In the past if a farmer was delinquent or late in payment, it was almost automatic that the bank or association began foreclosure or liquidation action. The banks and associations were not focused on helping the farmer through restructuring. With mounting losses, it became clear that doing business as usual would not suffice. A more lenient attitude was needed. Because this was not forthcoming from the System, Congress made restructuring an integral part of the financial assistance package. If System banks were to receive assistance from the Congress, they must restructure farmer loans where it is cheaper. *This legislation requires restructuring of farmer loans if it is the least cost alternative.*

133 Cong.Rec. S18458, S18469-70 (1987) (emphasis added).

In the light of the above, there certainly can be no quarrel that Congress viewed the Act as responsive to the needs of farmer-borrowers in ways that earlier Farm Credit Acts were not. Moreover, the Act clearly manifests Congress' intent to provide borrowers with the ability to enforce procedures granted to protect them from unjustified foreclosure. This can only be done by implying a private right of action for borrowers. *See, infra,* part G.

Implying a private right of action for borrowers to enforce carefully defined procedures mandated by the language of the Act is also consistent with a further goal of the 1987 Act to strengthen and stabilize the farm credit system. The Act requires lenders to make cost-effective decisions concerning the possibility of restructuring. *See Harper v. Federal Land Bank,* 878 F.2d at 1175 ("the 1987 Act is further reinforced by the

fact that a borrower's right to restructure a delinquent loan is limited to situations in which the cost of restructuring is less than or equal to the cost of foreclosure"). Granting borrowers a private right for injunctive relief requires lenders to weigh the costs of restructuring against the costs of foreclosure before resorting to the latter. Injunctive relief strengthens, rather than weakens, the Farm Credit System by requiring lenders to make a decision based on a thorough review of all factors and procedures deemed important by Congress.

E. Other Legislative History

When the bill reached the floor of the Senate after committee hearings, Senator Burdick (D-ND) offered an amendment on the Senate floor to expressly provide that *any person* would have a right to sue under the Act. His concern was that the House bill, which conferred an express cause of action only on borrowers, was too narrow, eliminating existing rights.[6] He stated:

> Currently, any person has the right to sue these two entities. However, the House provision arguably limits this right to borrowers of the System. This restricts rights of persons who are not yet borrowers, or who are farmer-borrowers, to sue.

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6 The House version of the 1987 Act included a provision that gave *borrowers* the right to sue any farm credit institution for violation "of any duty, standard, or limitation prescribed under the Act and owing to the borrower." H.R. 3030, 100th Cong., 1st Sess., 133 Cong.Rec. H7638, H7692 (Sept. 21, 1987).

Senator Burdick was obviously concerned that applicants for loans would be given rights but denied the right to enforce them under the House bill. He wanted to make sure that they, too, had the right to maintain an action to enforce the rights and procedures granted by the Act. His impression that, at the time, any person had the right to sue was not correct. This Circuit, for instance, held in *Redd v. Federal Land Bank of St. Louis*, 851 F.2d 219, 223 (8th Cir.1988) and *Mendel v. Production Credit Ass'n of the Midlands*, 862 F.2d 180 (8th Cir.1988) that a borrower

> My amendment simply cleans up this problem and restores the rights to all persons, whether borrowers or not.

133 Cong.Rec.S. 16995 (December 7, 1987).

Senator Boren (D-Okla.), chairman of the Senate Subcommittee on Agricultural Credit and floor manager for the bill, responded as follows:

> I am told that the House has unduly restricted the right of the borrower to bring suit and that this is the proposal in the House bill. It would be my thought ... that we would oppose that House provision in the conference committee. That would have much the same effect as the adoption of the Burdick amendment would have without our attempting to write the actual language of the amendment here on the floor at this time.

Senator Richard Lugar, (R-Ind.), ranking minority member of the Senate Agriculture Committee, stated:

> I would confirm the understanding that the distinguished Senator from Oklahoma and I have with the distinguished author of this amendment.

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did not have the right to bring an action for damages under the 1985 Amendments to the 1971 Farm Credit Act.

Much of the misunderstanding over the question of whether borrowers had a private right of action at the time Congress enacted the present Act stems from an apparent confusion between common law actions under state law and statutory actions. *See, e.g.*, 133 Cong.Rec. H00000-30 (consideration of H.R. 3030 on the floor of the House of Representatives, statements of Representatives Watkins, Madigan and Glickman). At the time of enactment, some states permitted borrowers to use the Farm Credit Act of 1971 and its Amendments as a defense to foreclosure. *See, e.g., Federal Land Bank of St. Paul v. Overboe*, 404 N.W.2d 445 (N.D.1987). *But see, e.g., Production Credit Ass'n v. Van Iperen*, 396 N.W.2d 35 (Minn.App.1986).

> We will in fact oppose the House amendment in conference. We understand the problem, and we would appreciate the Senator's not pursuing this amendment on this occasion with that assurance.

Id. On the basis of these assurances, Senator Burdick withdrew his amendment and the bill passed.[7]

The comments of Senator Boren and Senator Lugar are not, as described by the Bank and the Ninth Circuit in *Harper v. Federal Land Bank of Spokane,* 878 F.2d at 1176, isolated comments in the legislative record selected by plaintiffs to bolster their case. They were the comments by those in Congress responsible for managing the Act through the legislative process, making their statements more indicative of legislative intent than typical statements made during congressional proceedings. It thus seems patently clear that the Democratic and Republican managers of the bill on the Senate floor believed that accepting the House amendment would limit rather than expand the right to bring a private cause of action for the enforcement of the specific provisions of the Agricultural Credit Act.

F. Prior Case Law

The Bank argues that earlier Farm Credit System cases decided by this Court involving the question of implied right to private actions militate against giving such rights here. We do not agree. To the contrary, we believe that the past cases of this Circuit support the right to equitable relief. In *Allison v. Block,*

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7 Senators Burdick, Boren and Lugar, and the other congressmen who spoke, clearly intended that there be some form of judicial enforcement, at least the kind of judicial enforcement that is asked for in the instant case. On the other hand, there is not a single individual senator or congressman who stood up and said, "All right constituents, we are giving $4 billion to bail out the Farm Credit System. Along with this, we are going to give farmer-borrowers specific rights, but we do not intend to make such rights enforceable in court."

723 F.2d 631 (8th Cir.1983), we held that farmers were entitled to declaratory and injunctive relief against the Secretary of Agriculture and other officials enjoining them from foreclosing farm loans obtained from the Farmers Home Administration because the Secretary had failed to promulgate procedural and substantive regulations implementing legislation intended to defer farm loans in certain circumstances. The injunction prohibited the Secretary from foreclosing on farm loans until he had complied with the congressional Act.

In *Wilson, et al. v. Mason State Bank,* 738 F.2d 343 (8th Cir.1984), we held that the Wilsons could not maintain an action for *damages* against a private bank who had made a loan to the Wilsons under the Emergency Agricultural Adjustment Credit Act of 1978. Pub.L. No. 95-334, 92 Stat. 429-33 (appearing at 7 U.S.C. following section 1947) (1982). We distinguished *Allison v. Block, supra,* on the following grounds:

> *Allison* involved an action by a farmer against the Secretary of Agriculture to enforce the provisions of 7 U.S.C. § 1981a (1982). We found that in section 1981a, it was *Congress's intention to place an affirmative duty on the Secretary of Agriculture to establish procedures* to defer foreclosures on farm loans. We found that the purpose of the amendment was to benefit the farmers subject to foreclosure. We held that the Secretary's failure to establish such procedures was an abuse of discretion and granted the farmer injunctive relief. *Allison,* as such, *provides no support for the Wilsons' attempt to imply a private cause of action to recover money damages* for the Bank's alleged violations of regulations promulgated to protect FmHA.

Wilson, 738 F.2d at 345 (emphasis added).

In *State of Iowa, ex rel. Miller v. Block,* 771 F.2d 347 (1985) (Heaney, J., joined by Lay, C.J., with Fagg, J., dissenting), we again granted relief to individual farmers who sought to compel the Secretary of Agriculture to develop a program for the making of "disaster payments" to Iowa farmers who suffered disasters within the meaning of the Act. We noted that:

> It is not the business of this Court to order the Secretary to make payments under the SDPP to specific farmers. But when Congress has created a program which contemplates that such payments will be made in appropriate circumstances, it is the clear duty of the Secretary to promulgate regulations which carry out the intent of Congress.

Id. at 352. We noted the importance of the "imperative language in the statute ('*shall*' make disaster payments)." *Id.* at 355.

In *Redd v. Federal Land Bank of St. Louis,* 851 F.2d 219, 223 (8th Cir.1988), we held that the 1985 Amendments to the 1971 Farm Credit Act did not create an implied right of action *for damages.*

In *Mendel v. Production Credit Ass'n of the Midlands,* 862 F.2d 180 (8th Cir.1988), we followed *Redd* and held that neither the Farm Credit Act of 1971 nor the 1985 Amendments created by implication a private right of action *for damages.* We specifically left open the question of whether farmer-borrowers might have a private right of action to enforce the provisions of the 1985 Amendments.

There are significant differences between the 1985 Amendments and the 1987 Act. The 1985 Amendments did not have a section entitled "Borrowers' Rights." Title III of the 1985

Amendments was entitled: "TITLE III—PROTECTION FOR FARMERS AND OTHER FARM CREDIT SYSTEM BORROWERS; DISCLOSURE AND ACCESS TO INFORMATION." The 1985 Amendments simply required that System lenders shall (1) provide to their borrowers meaningful and timely disclosure of interest rate information,[8] (2) develop a policy of forebearance,[9] (3) provide borrowers copies of loan

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8 SEC. 4.13. DISCLOSURE.—(a) In accordance with regulations of the Farm Credit Administration, System institutions shall provide to their borrowers, for all loans that are not subject to the Truth in Lending Act (15 U.S.C. § 1601 et seq.), meaningful and timely disclosure of the following:

(1) the current rate of interest on the loan;

(2) in the case of an adjustable or variable rate loan, the amount and frequency by which the interest rate can be increased during the term of the loan or, if there are no such limitations, a statement to that effect, and the factors (including, but not limited to, the cost of funds, operating expenses, and provision for loan losses) that will be taken into account by the lending institution in determining adjustments to the interest rate;

(3) the effect, as shown by a representative example or examples, of the required purchase of stock or participation certificates in the institution on the effective rate of interest; and

(4) any change in the interest rate applicable to the borrower's loan.

9 SEC. 4.13. DISCLOSURE.—(b) In accordance with regulations of the Farm Credit Administration System institutions shall develop a policy governing forbearance. Each System institution shall provide borrowers with a copy of the institution's policy regarding forbearance at such time or times as the Farm Credit Administration shall prescribe in such regulations.

documents,[10] (4) establish credit review committees,[11] and provide a loan review mechanism.[12]

By 1987, Congress had determined that it simply could not rely on the Farm Credit System to initiate and operate a program and to promulgate regulations to implement that program

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10 SEC. 4.13A. ACCESS TO DOCUMENTS AND INFORMATION.—In accordance with regulations of the Farm Credit Administration, System institutions shall provide their borrowers, at the time of execution of loans, copies of all documents signed by the borrower and at any time thereafter, on a borrower's request, copies of all documents signed or delivered by the borrower and at any time, on request, a copy of the institution's articles of incorporation or charter and bylaws.

11 SEC. 4.14. RECONSIDERATION OF ACTION ON LOAN APPLICATION.—The Board of directors of each Farm Credit System institution shall establish one or more credit review committee(s), which shall include farmer board representation. Any loan applicant who has received written notice, under section 4.13, of a decision to deny or reduce the loan applied for, if the applicant so requests in writing within thirty days after receiving such notice, may obtain a review of such decision in person before the credit review committee. When a loan applicant requests review of an adverse credit decision, a majority of persons serving on such reviews committee must be persons who were not involved in making the adverse decision. Promptly after any such review, the applicant shall be notified in writing of the credit review committee's decision and the reasons therefor.

12 SEC. 307. Each local lending institution of the Farm Credit System established under the Farm Credit Act of 1971 (12 U.S.C. § 2001 et seq.) shall—

(1) review each loan that has been placed in non-accrual status by such institution to determine whether such loan may be restructured based on changes in the circumstances of such institution as the result of this Act and the amendments made by this Act; and

(2) notify in writing the borrower of each such loan of the provisions of this section.

which would give meaningful relief to distressed farmer-borrowers.[13]

G. Alternate Remedies

The Bank argues that Congress has armed the farm credit system with a variety of administrative remedies to assure compliance with the borrowers' rights provisions of the Agricultural Credit Act of 1987 and that by entrusting the Farm Credit Administration (FCA) in the first instance with enforcement of the Act, Congress provided a mechanism that fosters consistency in interpretation and application and minimizes the potential expense and delay of numerous private court challenges to the conduct of institutions within the System. The plain fact, however, is that the FCA is in no position to effectively enforce the borrowers' rights provisions of the 1987 Act. The farm borrowers have no way to invoke the remedial powers of the FCA. There is no procedure for filing charges or complaints. As the Supreme Court noted in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979),

> [Congress] has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those

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13 Representative Jones of Tennessee, in bringing H.R. 3030 from committee to the floor of the House, stated:

> In summary I want to let the system and FCA know that together they destroyed the integrity of the 1985 Farm Credit Act and necessitated this year's legislation. The Congress cannot tolerate such irresponsible action again and we expect the system and its regulator to diligently undertake their respective responsibilities and to cooperate in those matters that are necessary to ensure that full advantage is taken of the provisions of the new law.

133 Cong.Rec. H11869, H11873 (December 18, 1987).

> persons the ability to activate and participate in the administrative process contemplated by the statute.

There is no such assurance here.

Moreover, this record does not support the view that the FCA has either the ability or willingness to enforce the borrowers' rights provisions. The FCA has viewed its primary responsibility as one of examining the institutions in the System for financial condition, quality of management, soundness and compliance with laws and regulations. The fact is that during 1987 the FCA took only 24 enforcement actions, none of which sought compliance with the borrowers' rights provisions of the 1987 Act.

Finally, even if the FCA with its limited resources wanted to enforce the borrowers' rights provisions of the Act, its authority to issue temporary cease and desist orders is unavailable because such orders can only be issued if the lender's violation

> is likely to cause insolvency or substantial dissipation of assets or earnings of the institution or otherwise seriously prejudice the interests of the investors in Farm Credit System obligations or shareholders in the institution.

12 U.S.C. § 2262(a). Similarly, its authority to suspend or remove officers extends only to those situations involving substantial financial loss, impairment of shareholder interests or personal dishonesty. 12 U.S.C. § 2264(a).

In sum, borrowers are unable to enforce their rights through administrative avenues. *But see Harper v. Federal Land Bank*, 878 F.2d at 1176-77.

II. ANTI-INJUNCTION ACT

The district court held that the Zajacs' request for injunctive relief violated the Anti-Injunction Act. The Zajacs disagree, arguing that this case falls squarely in the "expressly authorized" exception to the Anti-Injunction Act. The test to determine whether a federal statute expressly authorizes an injunction against state court proceedings "is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended *scope* only by the stay of a state court proceeding." *Mitchum v. Foster,* 407 U.S. 225, 238, 92 S. Ct. 2151, 2160, 32 L.Ed.2d 705 (1972) (emphasis added). Moreover, the federal statute in question does not have to make specific reference to either the Anti-Injunction Act or an injunction of state court proceedings. *Id.* at 237, 92 S. Ct. at 2159; *Amalgamated Clothing Workers of America v. Richman Bros. Co.,* 348 U.S. 511, 516, 75 S. Ct. 452, 455-56, 99 L.Ed. 600 (1955).

First, the Federal Land Banks were created by Congress in 1916 as "instrumentalities of the United States." 12 U.S.C. § 2011. Indeed, the entire Farm Credit System itself is uniquely federal because it is created by and exists at the pleasure of the Congress. Also, systemwide requirements of the Agricultural Credit Act of 1987, such as restructuring, are not only uniquely federal; such provisions are absolutely federal.

Second, the congressional purpose underlying the Act will be completely defeated if the Zajacs are not granted injunctive relief to stop the state foreclosure process. Both the House and the Senate were concerned about the System lenders' past

abuses of state court foreclosure proceedings.[14] Congress, therefore, enacted the Act to preclude the institution or continuation of a state court foreclosure proceeding until the lender considers restructuring. By temporarily stopping the continuation of a foreclosure proceeding, the Act encompasses the use of injunctions by a federal court to prevent state court foreclosure proceedings in violation of the Act.

The Act, together with its legislative history, establish congressional authorization so that the 1987 Act falls squarely within the "expressly authorized" exception to the Anti-Injunction Act. Thus, the Anti-Injunction Act does not bar injunctive relief in this instance.

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14 In the instant case, the Bank used state court foreclosure proceedings once the Zajacs could not meet their financial obligations. By enacting the 1987 Act, Congress attempted to require System lenders to evaluate the economics of restructuring before resorting to the drastic remedy of foreclosure. When introducing one of the Senate bills, Senator Pryor explained:

> The Farm Credit System was established to ensure the existence of a viable source of credit on reasonable terms for farmers at times when the market will not provide such credit. The Farm Credit System's historical mission has been to strengthen participation in agriculture, by broadening the availability of credit to borrowers ... Unfortunately, during the crises of the past few years the managers of the Farm Crdit System seem to have forgotten whom their cooperative was established to serve. In many parts of the country the Farm Credit System looked to foreclosure as a first resort rather than a last resort.... The bill that we introduce today is aimed at reestablishing Farm Credit System policies that will help farmers in need of help and at preserving local control of the Farm Credit System.

S. 1156, 100th Cong., 1st Sess., 133 Cong.Rec. 6102-03 (May 6, 1987). Senator Melcher, upon introduction of the second Senate bill, stated:

> Before this crisis becomes a disaster, Mr. President we must do something to lift this crushing burden from the back of rural America. We must get system interest rates down and stop the wholesale foreclosure and forced liquidations of family farms and ranches.

S. 1665, 100th Cong., 1st Sess., 133 Cong.Rec. 11725 (August 7, 1987).

CONCLUSION

We thus conclude that farm borrowers have a private right of action to enforce the borrowers' rights provisions of the Act, one of which requires that, on review, an independent appraiser be named on the request of the farmer-borrower.[15] We go no further than that in this case.[16] We do not suggest that, if the

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15 In *Harper*, the Ninth Circuit in applying *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2087-88, 45 L.Ed.2d 26 (1975), apparently concluded the 1987 Act was not enacted for the "especial" benefit of farmer-borrowers. *Harper v. Federal Land Bank of Spokane*, 878 F.2d at 1174-75. We disagree. There can be no doubt that farmer-borrowers are a protected class under the Act because its language and structure established broad rights for borrowers and mandatory duties for lenders. A private cause of action will be readily found "where the language of the statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff." *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771-72, 101 S. Ct. 1451, 1462, 67 L.Ed.2d 662 (1981), *quoting Cannon v. University of Chicago*, 441 U.S. 677, 690 n. 13, 99 S. Ct. 1946, 1954 n. 13, 60 L.Ed.2d 560 (1979); *Miener v. State of Mo.*, 673 F.2d 969, 974 n. 4 (8th Cir.1982).

Certainly, Congress drafted the 1987 Act with an "unmistakable focus on the benefitted class," farmer-borrowers. *Cannon*, 441 U.S. at 691, 99 S. Ct. at 1955; *Hofbauer v. Northwestern Nat. Bank of Rochester*, 700 F.2d 1197, 1200 (8th Cir.1983). This is not a case where the provisions in question were primarily concerned with lenders rather than borrowers. *Hofbauer*, 700 F.2d at 691. There is no better evidence of this "unmistakable focus" than the fact that the 1987 Act permits only borrowers to initiate the procedures enacted within the "borrowers rights" provisions of the Act. Moreover, to conclude otherwise ignores the fact that the Federal Credit System was created specifically to provide capital for farmers.

16 Such a rule will not result in costly litigation for System lenders. Enforceable rights of borrowers are limited, requiring only specific injunctive relief. There will be the need for only limited discovery and pleadings. Moreover, we have not held that damages are available. Ultimately, if the System lenders follow the narrowly prescribed rules set forth in the Act, this Court will not permit an action to proceed into the merits of the System lender's decision to foreclose rather than restructure.

borrowers' rights provisions are followed and the credit review committee still decides to deny the request to restructure, we will review the reasonableness of that decision. We have no intention of interjecting ourselves into credit decisions of a System lender if the lender complies with the statutorily mandated procedures. Our view is that Congress enacted the Act in the belief that System lenders would act wisely if they complied with such procedures. With respect to the procedure at issue here, Congress wanted to ensure that there was an independent appraisal in the record so that the farmer-borrower could effectively argue his case before the credit review committee and that the committee would base its decision on all relevant information. We believe that it would be inappropriate for us to refuse to enforce this specific procedure.

As a final argument, the Bank asserts that its failure to grant the Zajacs' request for an independent appraisal is plainly harmless under the circumstances of this case. The Bank's assertion may well be true, but its request fails to recognize the limited scope of the rights granted to borrowers by Congress and, thereby, the limited scope of the remedies available to federal courts pursuant to the Act. By asking to evaluate the harmlessness of the Bank's decision, the Bank asks this Court to evaluate whether the credit review committee's decision to foreclose is reasonable in light of an independent appraisal prepared by the Zajacs. This sort of question—whether a credit review committee's decision is reasonable—is a type of judicial inquiry clearly not authorized by the Act or desired by Congress. This Court can enforce only those specific procedures granted to protect borrowers. We therefore remand this matter to the district court with directions to enjoin the Bank from foreclosing on the property in question until such time as the

Bank complies with the mandated procedures found in the borrowers' rights provisions of the Act.

FAGG, Circuit Judge, dissenting.

For the reasons stated by the Ninth Circuit in *Harper v. Federal Land Bank of Spokane,* 878 F.2d 1172 (9th Cir.1989), I do not believe farm borrowers have an implied cause of action to enforce the borrowers' rights provisions of the Agricultural Credit Act of 1987. Thus, I would affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

No. 89-863

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

MYRON HARPER AND JANE HARPER, *Petitioners*,

v.

FEDERAL LAND BANK OF SPOKANE et al., *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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GHP

LISTING PURSUANT TO COURT RULE 28.1

Respondent Federal Land Bank of Spokane, a federally chartered entity, was a predecessor of the current Farm Credit Bank of Spokane, which was created by merger of the Federal Land Bank and the Federal Intermediate Credit Bank of Spokane. The Farm Credit Bank of Spokane provides loans to borrowers in the Twelfth Farm Credit District (Oregon, Washington, Idaho, Montana, and Alaska).

Willamette Production Credit Association has been liquidated. Its assets have been transferred to Farm Credit Bank of Spokane, as successor to the Federal Intermediate Credit Bank.

The Farm Credit Bank of Spokane, like its predecessor entities, was established under the Farm Credit Act of 1971, as amended.

No. 89-863

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

MYRON HARPER AND JANE HARPER, *Petitioners*,

v.

FEDERAL LAND BANK OF SPOKANE et al., *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Myson S. and Jane Harper filed their petition for certiorari with this Court on November 22, 1989. They noted an apparent conflict between the disposition of this case by the Ninth Circuit court of Appeals (*Harper v. Federal Land Bank of Spokane*, 878 F2d 1172 (9th Cir 1989) (rehearing and hearing en banc denied)); and that of the Eighth Circuit Court of Appeals in *Zajac v. Federal Land Bank of St. Paul*, 887 F2d 844 (8th Cir 1989). The court in Harper found no private right of action implicit in the Agricultural Credit Act of 1987 (Pub L No 100-233, 101 Stat 1568) (878 F2d at 1173, 1177). In *Zajac*, the Eighth Circuit did discern an implied right to sue (887 F2d at 856). Petitioners then stated, "[W]here there is both a conflict among courts of appeal and an important legal question, this court has exercised its discretion and granted review by writ of certiorari" (petition p 7).

The Federal Land Bank of St. Paul suggested the appropriateness of a rehearing en banc of *Zajac*. By order of December 7, 1989 (see Appendix to this brief), the Eighth Circuit granted rehearing en banc and expressly vacated the earlier panel opinion and judgment.

As to the only issue which petitioners bring before this Court, any conflict that existed between the circuits has dissolved. The Court should deny the petition or defer ruling on the petition until the Eighth Circuit Court of Appeals has handed down its en banc decision in *Zajac*.

Respectfully submitted,

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December 22, 1989

APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-5353ND	*	
	*	
Raymond P. Zajac and Helen Ann Zajac,	*	
	*	Appeal from the
	*	United States District
	*	Court for the District of
Appellants.	*	North Dakota
	*	
vs.	*	
	*	
Federal Land Bank of St. Paul,	*	
	*	
Appellee.	*	

The panel opinion filed and the judgment entered on October 5, 1989 are vacated, and appellee's suggestion for rehearing en banc is granted. The case is set for oral argument before the Court en banc at 8:30 a.m. on Friday, January 19, 1990, in the U.S. Court and Custom House in St. Louis, Missouri. Argument is limited to fifteen (15) minutes per side.

Counsel may simultaneously file, within thirty (30) days of the date of this order, supplemental briefs which are not duplicative of the briefs originally filed. The supplemental brief should not exceed fifteen (15) pages in length.

December 7, 1989.

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain.
Clerk, U.S. Court of Appeals, Eighth Circuit.

No. 89-863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MYRON HARPER AND JANE HARPER,
Petitioners

v.

FEDERAL LAND BANK OF SPOKANE,
A CORPORATION, *et al.*,
Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 89-863

MYRON HARPER AND JANE HARPER,
Petitioners

v.

FEDERAL LAND BANK OF SPOKANE,
A CORPORATION, *et al.*,
Respondents

SUPPLEMENAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Myron S. and Jane Harper respectfully submit the following United States District Court opinion as a supplemental appendix to their Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, which was filed with the Court on November 22, 1989.

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 88-449-PA

MYRON HARPER and JANE HARPER and
ROBERT GARNETT and CAROL GARNETT,
Plaintiffs,

v.

FEDERAL LAND BANK OF SPOKANE,
a corporation, *et al.*,
Defendants.

OPINION

June 27, 1988

PANNER, Chief Judge

Michael J. Martinis, Webb & Martinis, Salem, Or., James T. Massey, Farmers' Legal Action Group, Inc., St. Paul, Minn., Lawrence B. Rew, Corey, Byler, Rew, Lorenzen, Hojem, Pendleton, Or., for plaintiffs.

John D. Albert, Paul R.J. Connolly, Churchill, Leonard, Brown & Donaldson, Salem, Or., for defendant Willamette Production Credit Ass'n.

John A. Bryan, Sherman, Bryan, Sherman & Murch, Salem, Or., for defendants Federal Land Bank of Spokane and Kenneth Krueger.

Philip J. Hand, Klein & Hand, P.C., Woodburn, Or., for defendants Merle and Darlene Henny and Thomas Henny Nursery, Inc.

John R. Bolton, Asst. Atty. Gen., Charles H. Turner, U.S. Atty., Theordore Hirt, Neal Dittersdorf, Asst. U.S. Attys., Civil Div., Dept. of Justice, Washington, D.C., for federal defendants.

PANNER, J.

Plaintiffs Myron and Jane Harper and Robert and Carol Garnett bring this action against the Federal Land Bank and its president (FLB), the Willamette Production Credit Association (WPCA), the United States of America acting through the Farmers' Home Administration (FmHA), Merle and Darlene Henny and the Thomas Henny Nursery, Inc. (the Hennys), and the Farm Credit Administration and its board members (FCA).

On May 2, 1988, after a hearing, I granted the Harpers' motion for a preliminary injunction and enjoined defendants from transferring the Harpers' property pending resolution of their claims. On June 10, 1988, I granted the Garnetts' motions to join this action and for a temporary restraining order enjoining FLB from evicting the Garnetts from their property. On June 20, 1988, plaintiffs and FLB agreed to the continuation of an injunction against FLB concerning the Garnetts' property.

On June 21, 1988, a court trial was held on the Harpers' claims against FLB, WPCA, and the Hennys. The Harpers allege violations of the Agricultural Credit Act of 1987, 12 U.S.C. §§ 2001-2279aa-14 (1988). The parties agreed and I ordered that all other claims would be addressed separately at a later date.

At the trial, I allowed plaintiffs until June 22, 1988 to submit an additional affidavit of Myron Harper. I allowed defendants to depose the Harpers' previous attorney and file that deposition by June 23, 1988. I also allowed all parties to file supplemental briefs by June 23, 1988. Defendants, without prior approval, submitted a second affidavit of Chris Blumfield. Plaintiffs object to that affidavit. Because the record remained open after trial only for a very limited purpose, I strike the second affidavit of Chris Blumfield.

Based on the record, I find in favor of the Harpers.

BACKGROUND

The Harpers own and operate a farm in Marion County, Oregon. The Harper family has owned the property since 1853. The property consists of two separate tracts of land. The Hennys are tenants on one tract of land.

FLB claims an interest in the property under mortgages executed in 1970 and 1975. WPCA claims an interest in the property under mortgages executed in 1976, 1980, and 1981. FmHA claims an interest in the property under a mortgage executed in 1979.

In the 1980s, the Harpers experienced financial difficulties. WPCA rejected the Harpers' request for a loan renewal. In October 1984, WPCA filed a foreclosure action in state court. In February 1985, the Harpers filed an action in this court against numerous institutions and officers of the farm credit system, including many of these defendants. The Harpers sought, *inter alia,* an order enjoining the WPCA's state foreclosure proceeding. On June 4, 1985, I denied the Harpers' motion for an injunction and dismissed the action. *Harper v. Farm Credit Admin.,* 628 F. Supp. 1030 (D.Or.1985).

The state court action proceeded. The Harpers filed a Chapter 11 bankruptcy petition. In July 1986, WPCA obtained relief from the automatic stay and the state court foreclosure action was reinstated. In January 1987, upon the Harpers' motion, the bankruptcy court dismissed their petition.

In January 1987, FLB filed a foreclosure action against the Harpers in state court. In the spring and summer of 1987, the Harpers negotiated with WPCA, FLB, FmHA, and the Hennys without success. On September 3, 1987, the state court entered a default judgment of foreclosure in favor of FLB. On October 9, 1987, the state court entered a stipulated judgment of foreclosure in favor of WPCA.

After the judgments entered, the Harpers filed a Chapter 12 bankruptcy petition. On February 18, 1988, the bankruptcy court dismissed their petition.

In March 1988, a sheriff's sale was held on the Harpers' property. FLB purchased one tract of land, and the Hennys purchased the other. FLB moved for an order confirming the sale. The Harpers moved to set aside the judgment. Prior to a hearing on those motions, the Harpers filed this action. The state court denied the Harpers' motion to set aside the judgment and, over the Harpers' objection, confirmed the sale.

DISCUSSION

The Agricultural Credit Act of 1987 (Act) took effect on January 6, 1988. The Act provides that when a lender determines that a loan is or has become distressed, the lender shall provide written notice to the borrower that the loan may be suitable for restructuring. 12 U.S.C. § 2202a(b)(1). If the lender determines that the potential cost of restructuring the loan is less than or equal to the potential costs of foreclosure, the lender shall restructure the loan. *Id.* at § 2202a(e)(1). No lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring. *Id.* at § 2202a(b)(3).

The Harpers contend that when the Act took effect in January 1988 FLB and WPCA should have made the calculations to determine whether it was cost-effective to restructure their loans. The Harpers seek an order enjoining FLB and WPCA from continuing the foreclosure proceeding until this calculation is completed.

FLB and WPCA move for summary judgment on the grounds that 1) there is no private right of action under the Act, 2) defendants did not violate the Act, 3) the relief sought is prohibited by the Anti-Injunction Act, 4) the relief sought is prohibited by the tenth amendment, 5) the Harpers are estopped from seeking restructuring, and 6) the complaint fails to state a claim against WPCA.

1. Private Right of Action.

The Act does not expressly provide for a private right of action. In determining whether to infer a private right of action from a federal statute, the focal point is Congress' intent when enacting the statute. *Thompson v. Thompson*, --- U.S. ----, 108 S. Ct. 513, 518, 98 L.Ed.2d 512 (1988). As a guide to discerning that intent, the Supreme Court set forth four factors to be considered:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"--that is, does the statute create a federal right in favor of plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L.Ed.2d 26 (1975) (citations omitted).

Congress entitled Title I of the Act "Assistance to Farm Credit System Borrowers." In that Title, Congress established broad rights for borrowers and mandatory duties for lenders. The Harpers are borrowers within the farm credit system and, as such, are one of the class for whose especial benefit the statute was enacted.

The legislative history supports an implied right of action. Defendants contend that because Congress considered enacting an express right of action and later deleted that section, no right of action may be implied. Generally this would demonstrate congressional intent to deny a private right of action. Here,

however, a close look at the legislative history demonstrates Congress' intent to provide such a right.

On May 6, 1987, Senators Pryor, Cochran, Fowler, and Sanford proposed the 1987 Act, which included an express private right of action. S. 1156, 100th Cong., 1st Sess., 133 Cong. Rec. 6105 (May 6, 1987). The section by section analysis states, "Section 302 adds a new section 5.38 to the Farm Credit Act of 1971 *to affirm* that borrowers have a right to sue, in federal court ..." *Id.* at 6107 (emphasis added). Senator Fowler stated:

> I am particularly proud to be the sponsor of legislation that spells out a borrowers' bill of rights. The borrowers in this system have been abused, mislead, coerced by Farm Credit Administration banks and officials who have sought to remake this system along new lines, but to the detriment of local control and cooperative principles. To protect against such abuses in the future, the bill provides borrowers with specific rights, including the following: ... Borrowers have the right to sue in Federal court any institution of the Farm Credit System for violating duties owed to the borrower....

Id. at 6109.

On August 7, 1987, the Senate again considered the 1987 Act. S. 1665, 100th Cong., 1st Sess., 133 Cong.Rec. 11724 (August 7, 1987). That bill also included an express provision for a borrowers' private right of action. Senator Boren explained that "the bill will ensure a person's right to sue the Farm Credit System and the Farm Credit Administration and provides that the Federal district courts would have original jurisdiction without regard to the amount in controversy." *Id.* at 11755.

On September 21, 1987, the House discussed the 1987 Act. Representative Watkins stated:

> My amendment would allow the borrowers the right to sue. I really believe in my heart that the right to sue is implied within the bill itself, but I think it is our responsibility and our obligation to make sure that there is no question that the borrower has that right.

H.R. 3030, 100th Cong., 1st Sess., 133 Cong.Rec. 7638, 7692 (September 21, 1987). Another member of the House asked whether farmers had the right to sue now. Representative Watkins responded that in some states they did, and others they did not. Representative De La Garza immediately stated, "I have no problem with the gentleman's intention in allowing borrowers to sue, although I think basically they have that right now." *Id.* at 7693.

On December 2, 1987, the Senate revisited the 1987 Act. Senator Burdick proposed an amendment to the bill different from the House bill because the House bill "actually restricts the right to sue." S. 1665, 100th Cong. 1st Sess., 133 Cong.Rec. 16993, 16995 (December 2, 1987). He stated that "the House provision arguably restricts the right to borrowers of the System. This restricts rights of persons who are not yet borrowers, or who are former borrowers, to sue." *Id.* Senator Boren stated:

> I have been told that the House has unduly restricted the right of the borrower to bring suit and that that is the proposal that is in the House bill. It would be my thought ... that we would oppose that House provision in the conference committee. That would have much the same effect as the adoption of the Burdick amendment would have without our attempting to write the actual language of the amendment here on the floor at this time.

Id. Senator Lugar stated, "I would confirm the understanding that ... [w]e will in fact oppose the House amendment in conference. We understand the problem, and we would

appreciate the Senator's not pursuing this amendment on this occasion with that assurance." *Id.*

Consistent with their expressed intent, the Senate opposed the House provision, and it was deleted from the final Act. H.R. 3030, 100th Cong., 1st Sess. 133 Cong.Rec. 11820 (December 18, 1987).

Both the House and the Senate intended that the borrower have the right to bring a private action in federal court to enforce the Act. However, members of Congress, particularly Representative De La Garza, Chairman of the House Agricultural Committee, and Senators Boren and Lugar, all members of the conference committee, were under the misperception that the farmers already had the right to sue.

In *Cannon v. University of Chicago,* 441 U.S. 677, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court addressed a similar situation. In *Cannon,* the Court analyzed whether there was a private right of action under Title IX of the Education Amendments which Congress modelled after Title VI of the Civil Rights Act. Title VI was passed in 1964, but "in 1972, when [Congress] passed Title IX, Congress was under the impression that Title VI could be enforced by a private right of action and that Title IX would be similarly enforceable." *Id.* at 710-11, 99 S. Ct. at 1964-65. The Supreme Court stated that " 'the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was.' " *Id.* at 711, 99 S. Ct. at 1965 (quoting *Brown v. GSA,* 425 U.S. 820, 825, 96 S. Ct. 1961, 1964, 48 L.Ed.2d 402 (1976)).

Here, as in *Cannon,* an implied right of action is consistent with the intent expressed in both the House and the Senate. By eliminating the express provision of a private right of action, Congress did not intend to eviscerate that right. Rather, Congress intended to maintain the broad right to bring suit in federal court that it believed already existed.

An implied right of action is also consistent with the underlying purposes of the statutory scheme. Defendants

correctly note that the 1987 Act was designed to strengthen the farm credit system. Defendants contend that implying a right of action will weaken that system by creating costly litigation. The 1987 Act requires defendants to make cost-effective decisions concerning the possibility of restructuring loans. The Harpers brought this action for injunctive relief to require defendants to weigh the costs of restructuring against the costs of foreclosure before proceeding. They do not seek money damages. This suit, rather than weakening the system, seeks to force defendants to make an economical decision. Implying a private right of action for injunctive relief is consistent with the broad rights for borrowers and the mandatory duties for lenders created under the Act.

Finally, the rights created under the 1987 Act are exclusively federal. Congress created a comprehensive agricultural credit system aimed at keeping farmers on their land. Protection of the rights under the 1987 Act is not a traditional state concern nor is it addressed by state law.

I find that Congress intended to imply a private right of action to enforce borrowers' rights under the 1987 Act.

2. Violation of the Act.

The Act provides:

> LIMITATION ON FORECLOSURE
> No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section.

12 U.S.C. § 2202a(b)(3).

When the Act took effect, defendants had obtained default judgments of foreclosure in state court. Defendants contend that they had no obligation under the Act to consider restructuring after the judgments entered. The Harpers contend

that the sheriff's sale was the continuation of a foreclosure proceeding in violation of the Act.

Defendants contend that the Harpers' loan was reduced to a judgment and therefore cannot be restructured. Defendants contend that the Act requires balancing prospective costs of foreclosure against the costs of restructuring. Because the costs of foreclosure are prospective, defendants contend that Congress could not have intended the Act to apply after a foreclosure judgment has been obtained and the costs incurred.

Not all costs are prospective. *See e.g.* 12 U.S.C. § 2202a(a)(2)(A) (value of loan). Moreover, by requiring defendants to make the calculation prior to the continuation of a foreclosure sale, Congress assumed some costs would already be incurred. By stating that no lender shall continue a foreclosure proceeding without first considering restructuring, Congress intended a complete moratorium on all foreclosure proceedings. Under state law, the Harpers retained the right to terminate the foreclosure decree prior to the sheriff's sale. ORS 88.100. Defendants by pursuing the sheriff's sale continued the foreclosure in violation of their obligations under the Act.

Defendants contend that junior lienholders may be adversely affected by applying the Act to instances where foreclosure judgments have already entered. The possibility appears more hypothetical than real. As plaintiffs point out, and defendants concede, other districts have suspended all foreclosures and offered borrowers the right to apply for restructuring regardless of the state of foreclosure proceedings. FLB admits that it too has offered at least five borrowers the right to consideration of restructuring even after a judgment of foreclosure has entered. Moreover, all junior lienholders in this action are members of the farm credit system and subject to the requirements of the Act. After the effective date of the Act, defendants chose to continue with the sheriff's sale in violation of their duties under the Act. Defendants are responsible for any problems that may result from the continuation of the foreclosure proceeding. Finally, if defendants discover that it is

more cost-effective to restructure the Harpers' debt rather than to continue the foreclosure, then all parties will be placed *in statu quo ante,* as though the foreclosure had not occurred.

3. Anti-Injunction Act.

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.

The Anti-Injunction Act prohibits enjoining a state court proceeding at any time from its institution to the close of final process. *Hill v. Martin,* 296 U.S. 393, 56 S. Ct. 278, 80 L.Ed. 293 (1935). The prohibition cannot be avoided by naming only parties and not the state court, where the effect is to prevent the parties from proceeding with the state court action. *Los Angeles Memorial Coliseum Comm'n v. City of Oakland,* 717 F.2d 470 (9th Cir.1983).

The Anti-Injunction Act is an absolute bar to any injunction against a state court proceeding unless the injunction falls within one of the three narrow exceptions. *Chick Kam Choo v. Exxon Corp.,* --- U.S. ----, 108 S. Ct. 1684, 100 L.Ed.2d 127 (1988). Here, the question is whether an injunction to enforce the 1987 Act would fall within the "expressly authorized" exception to the Anti- Injunction Act.

To qualify under the "expressly authorized" exception, a federal law need not contain an express reference to the Anti-Injunction Act or expressly authorize an injunction against a state court proceeding. *Mitchum v. Foster,* 407 U.S. 225, 237, 92 S. Ct. 2151, 2159, 32 L.Ed.2d 705 (1972). "The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be

given its intended scope only by the stay of a state court proceeding." *Id.* at 238, 92 S. Ct. at 2160 (citations omitted).

In *Mitchum,* the Supreme Court held, based on an extensive review of the legislative history, that 42 U.S.C. § 1983 was within the expressly authorized exception to the Anti-Injunction Act. *Id.* at 242, 92 S. Ct. at 2162. In *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 635, 97 S. Ct. 2881, 2889, 53 L.Ed.2d 1009 (1977) (plurality opinion), the Supreme Court held that the legislative history of section 16 of the Clayton Act was void of congressional intent to authorize an injunction of state court proceedings. The Court noted that Congress was not concerned with the possibility that state court proceedings would be used to violate the antitrust acts, nor did Congress focus on a scheme which used state court litigation. *Id.* at 634, 97 S. Ct. at 2889. The Court stated that absent such legislative history or other evidence of congressional authorization, the antitrust statute did not fall within the expressly authorized exception to the Anti-Injunction Act. *Id.* at 635, 97 S. Ct. at 2889.

Here, the Farm Credit System lenders use state court foreclosure proceedings when a farmer can no longer meet his financial obligations. Congress intended to stop the flood of state court foreclosures with the 1987 Act. When introducing the 1987 Act, Senator Pryor explained:

> The Farm Credit System was established to ensure the existence of a viable source of credit on reasonable terms for farmers at times when the market will not provide such credit. The Farm Credit System's historical mission has been to strengthen participation in agriculture, by broadening the availability of credit to borrowers ... Unfortunately, during the crises of the past few years the managers of the Farm Credit System seem to have forgotten whom their cooperative was established to serve. In many parts of the country the Farm Credit System looked to foreclosure as a first resort rather than a

> last resort. ... The bill that we introduce today is aimed at reestablishing Farm Credit System policies that will help farmers in need of help and at preserving local control of the Farm Credit System.

S. 1156, 100th Cong., 1st Sess., 133 Cong.Rec. 6102-03 (May 6, 1987).

Senator Melcher stated:

> Before this crisis becomes a disaster, Mr. President we must do something to lift this crushing burden from the back of rural America. We must get system interest rates down and stop the wholesale foreclosure and forced liquidations of family farms and ranches.

S. 1665, 100th Cong., 1st Sess., 133 Cong.Rec. 11725 (August 7, 1987).

Representative Jones stated:

> In summary I want to let the system and FCA know that together they destroyed the integrity of the 1985 Farm Credit Act and necessitated this year's legislation. The Congress cannot tolerate such irresponsible action again and we expect the system and its regulator to diligently undertake their respective responsibilities and to cooperate in those matters that are necessary to ensure that full advantage is taken of the provisions of the new law.

H.R. 3030. 100th Cong., 1st Sess., 133 Cong.Rec. 11873 (December 18, 1987). Senator Melcher described the Act as providing "an agressive program of borrowers' rights to protect the individual borrowers." *Id.* at 18463 (December 19, 1987).

Senator McClure explained:

> The most important part of this legislation ... is the restructuring of farm loans of financially stressed

> farmer-borrowers of the System. In order to keep these farmers on the land it is necessary for System banks and associations to change their attitude toward debt restructuring. In the past if a farmer was delinquent or late in payment, it was almost automatic that the bank or association began foreclosure or liquidation action. The banks and associations were not focused on helping the farmer through restructuring. With mounting losses, it became clear that doing business as usual would not suffice. A more lenient attitude was needed. Because this was not forthcoming from the System, Congress made restructuring an integral part of the financial assistance package. If System banks were to receive assistance from the Congress, they must restructure farmer loans where it is cheaper. This legislation requires restructuring of farmer loans if it is the least cost alternative.

Id. at 18469-70.

Both the House and the Senate were concerned about the system lenders' past abuses of state court foreclosure proceedings. Congress therefore structured the Act to preclude the institution or continuation of a state court foreclosure proceeding until the lender considered restructuring. By prohibiting the continuation of a foreclosure proceeding, the Act encompasses the use of injunctions by a federal court to stop state court foreclosure proceedings which continue in violation of the Act. The Act, together with the legislative history, establish congressional authorization so that the 1987 Act falls within the expressly authorized exception of the Anti-Injunction Act. The Anti-Injunction Act does not bar injunctive relief under the 1987 Act.

Even if the Act did not fall within the expressly authorized exception, injunctive relief in this action would not be barred by the Anti-Injunction Act. The Harpers allege that FLB and WPCA have used the state court foreclosure proceeding to

violate their federal rights under the 1987 Act. These allegations present the elements of a section 1983 claim. In other words, defendants, under color of state law, have deprived the Harpers of their federal rights under the 1987 Act. *See e.g. White v. White,* 731 F.2d 1440 (9th Cir.1984) (federal court has jurisdiction over section 1983 claim even when state action takes the form of a state court proceeding); *Miofsky v. Superior Court,* 703 F.2d 332 (9th Cir.1983)(same). The Supreme Court held in *Mitchum* that claims under section 1983 are not barred by the Anti-Injunction Act and therefore relief is appropriate.

4. Tenth Amendment.

Defendants contend that this action is barred by the Tenth Amendment, citing *National League of Cities v. Usery,* 426 U.S. 833, 96 S. Ct. 2465, 49 L.Ed.2d 245 (1976). Defendants argue the tenth amendment applies where a federal statute regulates the state as a state, in areas of state sovereignty, which directly impair the states' ability to structure traditional governmental functions. *But see Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985) (overruling traditional versus nontraditional test).

The 1987 Act raises none of these considerations. The Act regulates Farm Credit System lenders, not the state. 12 U.S.C. § 2202a(a)(6). The regulations create duties for those lenders, unrelated to any area of state sovereignty, and do not interfere with the state's ability to structure integral governmental functions. The Tenth Amendment does not bar this action.

5. Estoppel.

Defendants contend that plaintiffs are estopped from seeking restructuring because they failed to assert their rights under prior regulations and stipulated to the WPCA judgment. Defendants contend that the Harpers brought this action only to delay the enforcement of the state court foreclosure decrees.

The Harpers contend that they never stipulated to the WPCA judgment of foreclosure. In his affidavit, Myron Harper stated that he and his wife never authorized their prior attorney, Roger Anunsen, to stipulate to the decree or to allow the decrees to be entered. He stated that both judgments were taken without their knowledge.

Defendants submit the deposition of Roger Anunsen. He stated that he never spoke to the Harpers about the default judgments, nor did he send them copies of those documents. He thought he had authority to stipulate to the WPCA judgment because the Harpers had generally agreed to cooperate with the farm credit institutions while they sought an attorney to proceed with a Chapter 12 bankruptcy. Mr. Anunsen also stated that Mr. Harper is an honest man and if Mr. Harper believed that he had not authorized a stipulated judgment, then that was true.

I find the Harpers never authorized their prior attorney to stipulate to the judgment in favor of WPCA. That judgment was entered without the Harpers' knowledge or consent. The Harpers have fought the foreclosure proceedings at every stage. They have twice sought the protection of bankruptcy court and twice asked this court for injunctive relief. The Harpers properly seek to enforce their rights under the 1987 Act. The doctrine of estoppel does not bar their claims.

6. Failure to State a Claim.

Defendants contend that the Harpers have failed to state a claim against WPCA. Plaintiffs allege that WPCA claims an interest in their property under prior mortgages. Plaintiffs also allege that their rights under the 1987 Act were violated by the continuation of the foreclosure proceeding. As a lender subject to the requirements of the Act, WPCA had a duty to weigh the costs of restructuring versus the costs of foreclosure prior to proceeding with the sheriff's sale. Plaintiffs have stated a claim against WPCA.

CONCLUSION

The Agricultural Credit Act of 1987 provides an implied right of action for borrowers to enforce their rights to restructure their debts under the Act. FLB and WPCA violated the Agricultural Credit Act of 1987 by continuing the state court foreclosure action against the Harpers' property after the effective date of the Act. FLB and WPCA had a duty to weigh the costs of foreclosure against the costs of restructuring, prior to proceeding with the sheriff's sale.

Defendants FLB, WPCA, and the Hennys are ENJOINED from evicting the Harpers from their property until FLB and WPCA afford the Harpers consideration of restructuring their distressed loans as required under the 1987 Act.

DATED this 27th day of June, 1988. 3:10 P.M.

/s/ Owen M. Panner
United States District Judge

No. 89-863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MYRON HARPER AND JANE HARPER,
Petitioners

v.

FEDERAL LAND BANK OF SPOKANE,
A CORPORATION, *et al.*,
Respondents

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents misread the Harpers' petition for certiorari to rely upon the conflict between the United States Court of Appeals for the Eighth and Ninth Circuits in *Zajac v. Federal Land Bank of St. Paul,* 887 F.2d 844 (8th Cir. 1989), and *Harper v. Federal Land Bank of Spokane,* 878 F.2d 1172 (9th Cir. 1989), as the sole reason for this Court to exercise its discretion to grant the petition. However, the Harpers offer two *separate* reasons why their petition should be granted, beginning on page 6 in a section entitled "*Reasons* for Granting the Petition." (Emphasis added.) The reasons cited by the Harpers include *both* the conflict between the circuits *and* the independent and separate consideration under Rule 17(c), which addresses the situation:

> When a state court or a federal court of appeals has decided an important question of law which has not been, but should be, settled by this court . . .

Thus, clearly, the Harpers submitted their petition on two separate grounds contemplated by this Court to support review by certiorari. The fact that the presence of both of these factors in a case has, in the past, heightened this Court's willingness to grant certiorari does not detract from the independent significance of each stated reason on its own merits. Nothing in the Rules compels or even suggests such a conclusion; indeed, nothing in the respondents' Brief in Opposition cites any authority in support of that position. Rather, the respondents merely select and quote out of context a statement from the petition that is part of an argument, not a jurisdictionally limiting allegation as the respondents would have it. Word games do not substitute for legal authority.

The petitioners have demonstrated that the question posed in this case is of enormous national significance. That significance, and this Court's previous decisions on "important questions" set out on page 19 of the petition, underscore the separate and independent reason for this Court to grant review by certiorari. The Court should grant the Harpers' petition because of the national importance of the issue—to the 600,000 farm credit borrowers nationwide, to the 12 Farm Credit Districts, to the hundreds of Farm Credit Associations they oversee, and to the federal judiciary, which is presiding over more than a score of *Harper/Zajac*-type cases at both the district and appeals court levels.

Finally, as the respondents point out, the Eighth Circuit has not yet heard argument on or decided the *Zajac* case en banc; the argument is set for January 19, 1990. The question of a conflict between the Eighth and Ninth Circuits will remain an open one until *Zajac* is resolved. If the Court concludes that the petition is worthy of its grant of certiorari *only* if a conflict exists on the *Harper/Zajac* issue, the petitioners agree with

respondents that the Court should defer ruling on the petition until the Eighth Circuit has issued its en banc decision in *Zajac*.

Respectfully submitted,

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